Supreme Court, U. S.
FILED
APR 22 1977
MICHAEL RODAK, JR., CLERK

76-1471

No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., RESPONDENTS

PETITIONER'S APPENDIX

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Appendix A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1064

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENT

ELYRIA-LORAIN BROADCASTING CO.,
WEEU BROADCASTING COMPANY,
WHAS, INC.,
THE HEARST CORPORATION,
THE WASHINGTON POST CO., ET AL.,
BELO BROADCASTING CORPORATION, ET AL.,
SCRIPPS-HOWARD BROADCASTING CO.,
AMERICAN NEWSPAPER PUB. ASSOCIATION,
GENERAL ELECTRIC BROADCASTING CO., INC.,
FORWARD COMMUNICATIONS CORP., ET AL.,
AMERICAN BROADCASTING CO., INC.,
LEE ENTERPRISE, INC., ET AL.,
ILLINOIS BROADCASTING CO., INC., ET AL.,
HOUSTON POST CO., ET AL.,
LOUISIANA TELEVISION BROADCASTING CORP.,
KUTV, INC.,
POST COMPANY,
KNUJ, INC.,
MICKELSON MEDIA, INC.,
CHRONICLE PUBLISHING CO.,
CHRONICLE BROADCASTING CO.,
BUFFALO EVENING NEWS, INC.,
WBEN, INC.,
KSL, INC., INTERVENORS

No. 75-1152

OWOSSO BROADCASTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1289

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE
UNITED STATES OF AMERICA, RESPONDENT
KSL, INC., INTERVENOR

No. 75-1379

WJAG, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
WHAS, INC.,
LOUISIANA TELEVISION BROADCASTING CORP., INTERVENORS

No. 75-1386

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1387

DAILY TELEGRAPH PRINTING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
WHAS, INC.,
LOUISIANA TELEVISION BROADCASTING CORPORATION
KSL, INC., INTERVENORS

No. 75-1388

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1567

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1614

THE BROCKWAY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1618

GRAY COMMUNICATIONS SYSTEMS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

Petitions for Review of an Order of the Federal Communications Commission

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Argued September 17, 1976

Decided March 1, 1977

Frank W. Lloyd, III, with whom *Charles M. Firestone* and *Henry Geller*, were on the brief for petitioner in No. 75-1064.

Thomas H. Wall, with whom *Suzanne Meyer*, *John H. Marple*, *B. Dwight Perry* and *Alan C. Campbell*, were on the brief for petitioners in No. 75-1263 and 75-1387.

Lee Loevinger, *Robert R. Bruce*, *James H. Sneed* and *Jonathan S. Kahan*, were on the brief for petitioner in No. 75-1289. *Martin Michaelson*, also entered an appearance for petitioner in No. 75-1289.

Aloysius B. McCabe, with whom *Michael Yourshaw* and *Arthur B. Hanson*, were on the brief for petitioner in No. 75-1567 and intervenor American Newspaper Publishers Association in 75-1064.

John P. Southmayd, with whom *Richard R. Zaragoza*, was on the brief for petitioner in No. 75-1614.

Robert B. Nicholson, Attorney, Department of Justice, with whom *Barry Grossman*, Attorney, Department of Justice, was on the brief for respondent, United States of America.

Werner K. Hartenberger, Counsel, Federal Communications Commission, for respondent, Federal Communications Commission. *Ashton R. Hardy*, General Counsel, Federal Communications Commission, *Daniel M. Armstrong*, Associate General Counsel, *Charles H. Bell, Jr.*, *Willard R. Nichols* and *Sheldon M. Guttmann*, Counsel, Federal Communications Commission, were on the brief for respondent, Federal Communications Commission. *Joseph A. Marino*, *Gregory Christopher* and *Stephen A. Sharp*, Attorneys, Federal Communications Commission also entered appearances for respondent Federal Communications Commission.

Ernest W. Jennes, with whom *Russell H. Carpenter, Jr.*, was on the brief for intervenors The Washington Post Company and Post-Newsweek Stations, Capitol Area Inc., *Nicholas W. Fels*, also entered an appearance for intervenors The Washington Post Co., et al.

William J. Dempsey, *Frederick H. Walton, Jr.*, and *Christopher J. Reynolds* were on the brief for Intervenor Belo Broadcasting Corporation.

Paul Dobin, was on the brief for intervenor Louisiana Television Broadcasting Corporation.

James E. Greeley and *Lawrence J. Bernard, Jr.*, were on the brief for petitioner in No. 75-1152.

Richard Hildreth, was on the brief for petitioner in No. 75-1379.

R. Russell Eagan and *Robert A. Beizer*, were on the brief for petitioner in No. 75-1618.

Lee M. Mitchell, was on the brief for intervenor WHAS, Inc., in Nos. 75-1064, 75-1379 and 75-1387.

Glen A. Wilkinson, *Robert W. Barker* and *William R. Loftus*, were on the brief for intervenor KSL, Inc.

John H. Widlen and *Dennis F. Begley*, were on the brief for intervenors KNUJ, Inc., Michelson Media and The Post Company.

Louis J. Sirico, Jr., and *Martin H. Rogol*, filed a brief on behalf of Public Interest Research Group, et al as *amici curiae*.

Marcus Cohn, *Paul Dobin* and *Martin J. Gaynes*, entered appearances for intervenors Elyria-Lorain Broadcasting Co and WEEU Broadcasting Co.

James P. Holden, entered an appearance for petitioner in Nos. 75-1686 and 75-1688.

William Dempsey and *Christopher Reynolds*, entered appearances for intervenors The Hearst Corporation and Scripps-Howard Broadcasting Co., et al.

James A. McKenna, Jr., *Thomas N. Frohock* and *Steven A. Lerman*, entered appearances for intervenors General Electric Broadcasting Co., Inc., Forward Communications Corporation, et al and American Broadcasting Companies, Inc.

Peter D. O'Connell, entered an appearance for intervenors Lee Enterprises, Inc., et al.

William M. Barnard, entered an appearance for intervenors Houston Post Company, et al.

William J. Potts, entered an appearance for intervenor KUTV, Inc.

Frank U. Fletcher, *Robert L. Heald* and *Marvin Rosenberg*, also entered appearance for intervenors The Chronicle Publishing Company, et al

Before: BAZELON, *Chief Judge*, WRIGHT and ROBINSON, *Circuit Judges*

Opinion for the Court filed by *Chief Judge* BAZELON.

BAZELON, *Chief Judge*: At issue are Federal Communications Commission regulations dealing with one aspect of media ownership concentration: newspaper-broadcast station cross-ownership. *Second Report and Order* (*Order*), 50 F.C.C. 2d 1046 (1974), *reconsidered* 53 F.C.C. 2d 589 (1975)[1] In 1970 the Commission proposed rules entirely eliminating newspaper-broadcast affiliation in a common city of operation. Docket 18110, 22 F.C.C. 2d 349 (1970). Following a lengthy rulemaking proceeding, the Commission issued the more limited ban challenged here by the National Citizens Committee for Broadcasting, the Justice Department and various media interests.[2] In relevant part, the rules:[3]

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[1] In addition to the newspaper-television regulations, 47 C.F.R. § 73.636(c), which form the heart of this case, the Commission also promulgated similar regulations regarding newspaper-radio station combinations. *But see* note 18, *infra*, 47 C.F.R. §§ 73.35(c), 73.240(c). Two of the petitioners, WJAG, Incorporated and Owosso Broadcasting, Inc., operate radio stations and presumably challenge those regulations. Their briefs, however, merely incorporate by reference briefs filed by other parties which do not distinguish between the radio and television regulations. Our discussion, therefore, will pertain equally to both sets of regulations.

The *First Report and Order* in Docket 18110, 22 F.C.C. 2d 306 (1970), proscribed the formation of new AM-FM combinations serving the same market and placed restrictions on the transfer of existing combinations. These regulations are not at issue in this appeal.

[2] In addition to WJAG, Inc., and Owosso, briefs were filed by the following parties representaing media interest: Daily Telegraph Printing Company (Daily Telegraph), Gray Communications Systems, Inc. (Gray), the Brockway Company (Brockway), National Association of Broadcasters (NAB), and American Newspaper Publishers Association (ANPA).

[3] The rules are codified at 47 C.F.R. §§ 73.35, 73.240, 73.636.

1) forbid the future formation or transfer of co-located newspaper-broadcast combinations [4];

2) preserve existing combinations except those in communities served by only one daily newspaper and one broadcast station encompassing the community with a city grade signal; in the latter cases, one of the interests must be divested within five years.[5]

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[4] Both havles of a combination cannot be transferred to the same party except by inheritance, 50 F.C.C. 2d 1046, 1076 (1975). A broadcast license will not be issued to a local daily newspaper; if a broadcast licensee acquires a daily newspaper in the city in which it is licensed, it must dispose of the station within one year. *Id.* at 1074-76, 1099-1107.

[5] Several definitions and qualifications are important. "Ownership" is not limited to majority stock ownership but "includes actual working control in whatever manner exercised." 47 C.F.R. § 73.636 note 1 *et seq.* Noncommercial educational stations and college newspapers are not subject to the divestiture rules and their presence in a community does not exempt local monopolies from the rules. 47 C.F.R. § 73.636(b), and note 10. "A daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication." 47 C.F.R. § 73.636 note 10. A "city grade signal," the most intense under the Commission's rules, provides a clear signal to the entire community to which the station is licensed. 47 C.F.R. §§ 73.685, 73.315, 73.188, The Commission chose not to use a grade A or grade B contour in determining the number of media voices in a community. A "grade A contour" is the line at which a good picture may be expected to be available for at least 90% of the time at the best 70% of receiver locations at the outer limits of that service area; a "grade B contour" is the line at which a good picture may be expected to be available for at least 90% of the time at the best 50% of reciever locations. Clarksburg Publishing Company v. F.C.C., 225 F.2d 511, 516 n.12 (D.C.Cir. 1955). For Commission policy on waivers and petitions to deny, *see* notes 19-21 *infra* and accompanying text.

Under the latter rule, roughly 90% of existing combinations are grandfathered. For the reasons expressed below, we affirm the prospective ban but vacate the rules dealing with existing combinations.

I. The Rulemaking Proceeding and Order

A. *The Proceeding.*

The Commission has long been aware that concentrated ownership threatens the public interest in a diversified mass communications media. The Commission's first multiple ownership rules, adopted in the 1940's, prohibited any party from owning or controlling more than one broadcast station in the same broadcast service in the same area.[6] As a result of the AM radio rules, divestiture was ordered in 24 cases.[7] The rules have since been tightened several times, most recently in the early stages of Docket 18110 to prohibit the common ownership of more than one broadcast station of any

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[6] Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941); 8 Fed. Reg. 16065 (1943). About this time the Commission also adopted the "Chain Broadcasting" rules, designed to combat the growing power of networks. As a result of these rules, the National Broadcasting Company was required to divest one of its dual networks, which eventually became the American Broadcasting Company. Docket 5060, May 1941. The Supreme Court upheld the Commission's authority to promulgate these rules, noting that the Commission may call on antitrust policies in implementing its public interest mandate. NBC v. United States, 319 U.S. 190, 223 (1943). The Commission also conducted during the 1940's an inquiry into potential problems of newspaper and broadcast station cross-ownership, but decided at that time to control cross-ownership abuses on a case by case basis rather than by rule. 6 Fed. Reg. 1580, 3302 (1940); 9 Fed. Reg. 702 (1944).

[7] 1945 FCC Annual Report at 2. The FM radio and VHF TV rules operated prospectively only.

type in the same service area.[8] The Commission enacted these rules without compiling a substantial record of tangible harm; it rested instead on its belief that "the effects of competition or its absence," are "not readily susceptible of quantitative ascertainments." 29 Fed. Reg. 7535, 7537, Docket 14711 (1967). The Commission has always viewed diversification as a factor of central importance in comparative license hearings.[9]

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[8] In 1953 the Commission imposed numerical limitations on the number of stations one individual could control, its authority being upheld in United States v. Storer Broadcasting, 351 U.S. 192 (1956). The multiple ownership rules were amended once again in 1964 to define precisely the standard for determining prohibited contour overlap. Multiple Ownership Rules, 2 Pike & Fischer RR 2d 1588 (1964).

[9] In McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C.Cir. 1956), for example, the court wrote, "In considering the public interest the Commission is well within the law when, in choosing between applications, it attaches significance to the fact that one, in contrast to the other, is dissociated from existing media of mass communication [newspapers] in the area affected," *quoting* Sripps-Howard Radio, Inc., v. FCC, 189 F.2d 677, 383 (D.C.Cir. 1951). In its *1965 Policy Statement on Comparative Renewal Hearings*, the Commission concluded that diversification should be a primary factor in allocating contested broadcast assignments. The Commission wrote,

> Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.

1 F.C.C.2d 393, 394. The Commission has applied the *1965 Policy Statement* in noncomparative hearings, although by its terms it is not applicable. Seven League Productions, Inc., 1 F.C.C. 2d 1597 (1965); A. H. Belo Broadcasting Corp., 47 F.C.C. 2d 540 (1974). *See generally, Comparing the Incomparable, Towards a Structural Model for FCC Comparative Renewal Hearings*, 43 U.CHI.L.REV. 573 (1976)

In 1970 the Commission broadened the scope of ongoing rulemaking proceedings, Docket 18110, to consider whether newspaper-broadcast affiliation was in the public interest.[10] 22 F.C.C. 2d 339. Citing figures indicating the high incidence of newspaper-television affiliation,[11] and the popular dependence of these media as information sources, the notice of proposed rulemaking stated that, as with two television stations, it is not "desirable that these two organs . . . be under the same control in any community." *Id.* at 344, 346. The Commission suggested that promotion of media competition and maximum diversification of media viewpoints might require the separation of all co-located newspaper-broadcast combinations. Since the Commission contemplated allowing divestiture to take place over five years under favorable tax treatment,[12] it expressed confidence that such a rule

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[10] Examination of newspaper-television station cross-ownership is a logical outgrowth of the Commission's ongoing concern with concentrated ownership. Apart from Docket 18110, the Commission has recently prohibited television networks from owning cable interests and telephone companies from operating cable systems in their service areas. *See* Tacopi v. F.C.C., 451 F.2d 1142 (9th Cir. 191); General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). The Commission also considered ordering newspapers to divest their cable systems, *CATV Notice of Proposed Rulemaking and Inquiry*, Docket 18891, 23 F.C.C.2d 833 (1970), but ultimately decided not to do so, 52 F.C.C. 2d 170 (1975).

[11] At the time of the *Notice of Proposed Rulemaking*, there were 94 newspaper-television combinations, of which 34 were in the top 50 markets, and 52 in the top 100. 22 F.C.C. 2d at 345. In 1975, 79 were still intact.

[12] The Commission indicated it would certify divestiture sales under the favorable gains provision of section 1071 of the Internal Revenue Code of 1954, as amended. 26 U.S.C. § 1071. The Commission also theorized that swapping of affected stations would further minimize losses. 22 F.C.C.2d at 347.

would produce no more than minimal economic losses. *Id.* at 347-48. Comments were invited.

Not surprisingly, the proposed rules generated considerable interest. Nearly 200 parties filed comments. In addition, roughly 25 major studies were lodged, *Order* at 1090-1094, although as will be explained in Section IV-A *infra*, the studies were of surprisingly little value.[13] In March 1974, the Commission requested additional comments dealing primarily with the central problem of newspaper-television cross-ownership. 45 F.C.C. 2d 768. Forty eight parties filed fresh comments.[14] Three days of oral argument were held and the *Order* was released on January 31, 1975.

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[13] In its brief, the Commission characterizes the studies as generally "inconclusive or unrealistic." Br. at 9, n.6. Although it did not state this opinion so badly in the *Order*, it repeatedly criticized many of the individual studies. *See generally*, Note, *Media Cross-Ownership—The FCC's Inadequate Response*, 54 TEX.L.REV. 336 (1976).

[14] Amicus curiae, Public Interest Research Group *et al.*, contend a remand is necessary because the Commission failed to develop an adequate "public interest" record. Only 2 of the original 200 comments and 6 of the subsequent 48 filings were filed by public interest groups. In light of our disposition of this case, we have no need to consider whether an agency has an affirmative obligation, not imposed by the Administrative Procedure Act, to seek out public interest comments. In any event, Docket 18110 was exceptionally well publicized. The Commission deferred all petitions to deny that alleged undue economic concentration until the docket was completed, calling further attention to the existence of the docket. *See, e.g.*, Hale v. F.C.C., 425 F.2d 556 (D.C.Cir. 1971); Stone v. F.C.C., 466 F.2d 316 (D.C. Cir. 1972). And, unlike NAITPD v. F.C.C., 502 F.2d 249, 258 (2d Cir. 1974), public interest groups actively participated in the proceeding. We would, of course, applaud any effort of the Commission to broaden the base of its rulemaking proceedings.

B. *The Order.*

After summarizing the comments and studies filed in Docket 18110, the Commission explained its justification for the prospective ban. Although the Commission had at one time encouraged newspaper sponsorship of broadcast stations, it concluded this policy was no longer warranted because broadcast licenses had become attractive to other types of investors. It had come to believe that "any new licensing should be expected to add local diversity," *Order* at 1075. Because granting a broadcast license to a local newspaper owner could not be expected "to enhance diversity," *id.*, the Commission decided to prohibit the creation of future combinations. However, a geographic limit was placed on this ban because "there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership." *Id.* Recognizing that various limits could be imposed, the Commission chose to employ the pattern used in earlier multiple ownership rules; the ban applies only if the station in question would or does encompass the common city with a city grade signal. *Id.*[15]

The Commission then focused on the more difficult question—what to do with existing co-located combinations. Initially, the Commission noted it had not yet paid sufficient consideration to certain possible side-effects of divestiture—reduction of local ownership, disruption of broadcasting continuity and local economic dislocations. *Order* at 1073. Claiming that stability and continuity of ownership serve the public interest, the Commission concluded that "a mere hoped for gain in diversity" was not adequate cause for disrupting ownership. Divestiture would be ordered "in only the most egregious cases." *Order* at 1080. In framing its *Order*,

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[15] *See* note 5 *supra*.

the Commission chose not to focus, as the Justice Department suggested, on competition for advertising, citing authority that it has discretion to determine the weight to be given antitrust principles in shaping its regulatory policy.[16] Instead, the Commission stated that the number of media voices serving a given area was a more important concern.

> If our democratic society is to function, *nothing can be more important* than insuring that there is a free flow of information from as many divergent sources as possible. . . .

Order at 1079 (emphasis added).

The Commission then explained a combination would be considered an "egregious case" if it had an "effective monopoly in the marketplace of ideas" with respect to local issues. Although the Commission stated it had examined "every" combination "known to us," *Order* at 1081, the record contained no evidence suggesting which combinations were monopolies in this sense. Instead, the Commission relied heavily on its experience, determining that a non-affiliated broadcast station encompassing the city of publication with a city grade signal could reasonably be expected to provide a sufficient additional voice on local matters, but that stations bathing the area with the weaker Grade A or Grade B signals could not.[17] Thus, the Commission ordered divesti-

[16] Northern Natural Gas Co. v. F.P.C., 399 F.2d 953, 959 (D.C.Cir. 1968) (citing cases). Earlier in the *Order*, however, the Commission stated that the prospective rules were based primarily on First Amendment concerns whereas the retroactive rules were based on both First Amendment and antitrust policies, *Order* at 1049.

[17] For definitions of these contours, *see* note 5 *supra*. Several parties vigorously asserted that Grade A and Grade B signals should be considered in determining the number of effective media outlets because, under the Commission's local ascertainment rules, stations are obligated to consider the needs of those residing within those contours. Although conceding that a station has a secondary obligation to ascertain the needs of nearby communities, the Commission nonetheless observed that it would be unrealistic to expect a station to give adequate attention to the local problems of areas on the margins of its contour. *Order* at 1082.

ture only where no other newspaper or city grade broadcast station was operating in the locality of the combination.[18]

As in its notice of proposed rule making, the Commission stressed that temporary or permanent waivers would be granted where appropriate because it did not intend to work a forfeiture through divestiture.[19] It made clear, though, it would not reconsider in waiver proceedings issues resolved in Docket 18110. *Order* at

[18] Divestiture was ordered in the cases of 7 out of 79 television-newspaper and 16 radio-newspaper combinations. In addition, a television-newspaper combination in Hickory, North Carolina, and a radio-newspaper combination in Brookfield, Missouri, fell within the divestiture requirement. But the Commission *sua sponte* granted waivers in each case. *Order* at 1085.

On one level, radio and television stations are treated equally under these regulations; divestiture is required if either type of station and an affiliated daily newspaper are the only media voices in the community. However, the existence of a city grade television station is sufficient to exempt a radio combination from divestiture, but the existence of a city grade radio station does not exempt a television combination. The difference in treatment is premised on the fact that television is the vastly more powerful medium.

[19] Temporary or permanent waivers would be appropriate if, for example, it were impossible to sell one of the interests or if sale could only be accomplished at an artificially depressed price. *Order* at 1085.

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1085.[20] Finally, the Commission indicated it did not intend to ignore antitrust considerations entirely, and would therefore continue to entertain petitions to deny on grounds of economic concentration. However, it tightened the requirements for granting such petitions, holding that it would set a hearing only when a violation of the Sherman Act was alleged. *Order* at 1088.[21]

The Commission reconsidered its regulations but did not materially alter them. 53 F.C.C. 2d 589 (1975). The various petitioners then brought this appeal assailing the rules on numerous grounds.

The remainder of the opinion will be organized as follows, with the first page of each section being noted in parentheses.

II. Validity of the Prospective Ban (slip p. 17)

A. Whether the Prospective Ban Has a Rational Basis (slip p. 18)

B. Whether the Prospective Ban Exceeds the Commission's Authority (slip p. 24)

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[20] In its *Reconsideration*, the Commission explained this point. A petition contending that in general, the presence of independent educational stations should exempt monopoly combinations from divestiture would not be set for hearing because that issue had been determined in the docket. On the other hand, a hearing would be set if the petition alleged that a particular educational station in fact was providing a community with an adequate additional voice. 53 F.C.C.2d at 235.

[21] The Commission had previously considered factors such as the size, extent and location of areas served; the number of people served; the classes of stations involved; and the extent of other competitive service to the areas in question in passing on petitions to deny on grounds of economic concentration. 47 C.F.R. §§ 73.53(b), 73.420(a)(2), 73.636(a)(2).

C. Whether the Prospective Ban Violates the First Amendment (slip p. 29)

III. Whether the Commission May Adopt Any Rule That Orders Divestiture Without an Evidentiary Hearing (slip p. 33)

IV. Validity of the Divestiture Rule Adopted by the Commission (slip p. 36)

A. Record Support for the Divestiture Order (slip p. 37)

B. Whether the Commission May Properly Require a Showing of Tangible Public Interest Harm to Support Divestiture (slip p. 47)

Conclusion (slip p. 59)

II. Validity of the Prospective Ban

The Commission must allocate use of the public airways by granting renewable licenses of no more than three years in the "public interest, convenience and necessity." 47 U.S.C.A. §§ 301, 303, 309(a). Congress purposely left this mandate open-ended so that the Commission could fashion its regulations in light of changing conditions. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). In exercising its function, the Commission may enact eligibility standards for licenses. *United States v. Storer Broadcasting*, 351 U.S. 192 (1955). Furthermore, the Commission may, under its authority "to encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g), enact rules designed to curb potential abuses, *Metropolitan Television Co. v. F.C.C.*, 289 F.2d 874 (D.C. Cir. 1961).

Because the Commission has the primary responsibility for allocating use of the electromagnetic spectrum, a presumption of correctness attaches to its regulations.

National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Of course, courts are not to rubber-stamp Commission regulations. On the contrary, review is to be "searching." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). This is especially so where the regulations touch on areas heavily laden with First Amendment interests.[22] Yet despite this care, courts are not to substitute their judgment for that of the Commission or review the facts de novo. With respect to the prospective rules, which reflect a legislative type policy judgment,[23] as opposed to the retroactive rules, which purport to be based also on factual considerations,[24] our primary task will be to ensure that the regulations are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(a). In addition, we must examine the contentions that the rules exceed the Commission's authority and violate the First Amendment.

A. *Whether the Prospective Ban Has a Rational Basis*

The licensing of speakers required by the Communications Act is unprecedented and has been justified

[22] More intense review is appropriate when Commission regulations or decisions trench on Constitutional rights, such as free speech. The Commission's expertise does not extend to Constitutional interpretation. National Broadcasting Co., Inc. v. FCC, 516 F.2d 1101 (1974); Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C.Cir.) (Bazelon, Statement as to why he would grant rehearing en banc), *cert. denied*, 414 U.S. 914 (1973).

[23] "The rules are not in the least premised on the existence of improprieties in the operation of the media holdings." *Order* at 1085.

[24] The factual nature of the retroactive rules will not alter the intensity of review but only the direction it takes. *See* text and notes at notes 53-54 *infra*.

under the First Amendment because of the scarcity caused by the physical limitations of the electromagnetic spectrum. The need for some regulation of the airwaves became clear in the 1920's when there was none. "With everybody on the air, nobody could be heard." *National Broadcasting Co. v. F.C.C.*, 319, U.S. 190, 226 (1943). In order to ensure the public's ability to hear some speakers, the rights of other potential speakers were curtailed. The hard choice was between forcing free speech to bend or watching it break.

The licensing scheme was based on antitrust policies as well. It was feared that the conditions of scarcity would make broadcasting a natural monopoly so as to silence a diversity of opinion.[25] "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

The Commission has recognized that a policy of diversity is central to the Communications Act,[26] and it has

[25] *See, e.g.*, Remarks of Senator Howell, during debates on Radio Act of 1927, the predecessor act to the current Communications Act. 67 Cong. Rec. at 12503 (1926).

[26] *See* 47 C.F.R. §§ 73-131-.138; .231-.240; .35; .658; 636 (1974); Frontier Broadcasting Co. 27 F.C.C. 2d 486 (1971). *See also* United States v. Midwest Video Corp., 406 U.S. 649, 665-670, 92 S.Ct. 1860, 1869-1871, 32 L.Ed. 2d 390 (1972); Metropolitan Television Co. v. FCC, 110 U.S.App. D.C. 133, 289 F.2d 874 (1961); Carter Mountain Transmission Corp. v. FCC, 116 U.S.App.D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951, 84 S.Ct. 442, 11 L.Ed.2d 312 (1963); Carroll Broadcasting Co. v. FCC, 103 U.S.App.D.C. 346, 258 F.2d 440 (1958); Simmons v. FCC, 83 U.S.App.D.C. 262, 169 F.2d 670, *cert. denied*, 335 U.S. 846, 69 S.Ct. 67, 93 L.Ed. 396 (1948); Chicagoland TV Co. 11 F.C.C. 2d 119, 136-137 (1967) (Hearing Exam.); *See* Policy Statement on

Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-396 (1965). Note, Diversification and the Public Interest: Administrative Responsibility of the FCC, 66 YALE L.J. 476 (1957).

It is judicially settled that the Commission may, indeed must, consider diversification of ownership in the licensing of broadcast frequencies. Citizens TV Protest Comm. v. FCC, 121 U.S.App.D.C. 50, 348 F.2d 56 (1965); Clarksburg Publishing Co. v. FCC, 96 U.S.App.D.C. 211, 336 F.2d 511 (1955). *See* United States v. Midwest Video Corp., 406 U.S. 649, 665-670, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972); National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943); United States v. Storer Broadcasting Co., 351 U.S. 102, 76 S.Ct. 763, 100 L.Ed 1081 (1956); Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed. 2d 701 (1971); Mansfield Journal Co. v. FCC, 86 U.S.App.D.C. 102, 180 F.2d 28 (1950). *See also* Pinellas Broadcasting Co. v. FCC, 97 U.S.App.D.C. 236, 241, 230 F.2d 204, 209, *cert. denied*, 350 U.S. 1007, 76 S.Ct. 650, 100 L.Ed. 869 (1956) (Bazelon, J. dissenting); Scripps-Howard Radio v. FCC, 89 U.S.App.D.C. 13, 189 F.2d 677, *cert. denied*, 342 U.S. 830, 72 S.Ct. 55, 96 L.Ed. 628 (1951).

Unfortunately, the Commission has not always pursued its diversification policy with unrelenting vigor. *See* Pinellas Broadcasting Co. v. FCC, 97 U.S.App.D.C. 236, 251, 230 F.2d 204, 209, *cert. denied*, 350 U.S. 1007, 76 S.Ct. 650, 100 L.Ed. 869 (1956) (Bazelon, J. dissenting) H. Friendly, The Federal Administrative Agencies 66-67 (1962); Schwartz, Comparative Television and the Chancellor's Foot, 47 Geo. I.J. 655, 673-678, 690-694 (1959); *see also* H. Geller, A. Modest Proposal to Reform the Federal Communications Commission 3-12 (Rand Corp. 1974) (describing FCC policy on development of UHF and VHF bands). In addition, its inability to forestall trafficking in licenses has at times rendered diversification an empty gesture. *See generally* Crowder v. FCC, 130 U.S.App.D.C. 198, 201-202, 399 F.2d 569, 572-573, *cert. denied*, 393 U.S. 962, 89 S.Ct. 400, 21 L.Ed.2d 375 (1968), *aff'g* Harriman Broadcasting Co., 9 F.C.C. 2d 731 (1967); 47 C.F.R. § 1.597 (1973); Moline Television Corp., 31 F.C.C. 2d, 263, 297-298 (1971) (Johnson, Comm'r. dissenting).

denied licenses to otherwise qualified applicants on the strength of that policy.[27] Since denying access to the airwaves to some involves a substantial, though at this time necessary, restriction of speech, it follows that the Commission acts properly when it attempts to promote diversity by allocating stations to those without control over an alternative major media voice. The Supreme Court has given its approval to a diversity policy based on First Amendment and antitrust considerations. The First Amendment "rest on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1944).[28] "The 'public interest' standard necessarily invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1972). In addition, even though the Commission does not enforce the antitrust laws, the Court has said the Commission may call on antitrust policies to promote diversity in giving content to "the public interest, convenience and necessity." *United States v. Radio Corporation of America* 385 U.S. 334, 351 (1958).

Nevertheless there are limits to diversification policy.[29] One limitation is contained in the statutory and First Amendment commands that the Commission shall not

[27] *E.g.* McClatchy Broadcasting Co. v. F.C.C. 239 F.2d 15 (1956), *cert. denied*, 353 U.S. 918 (1957).

[28] Although this statement was not made in a case reviewing FCC regulations, the Commission properly relied on it as support for its diversification policy. *Order* at 1050. The Court has referred to that language with approval in subsequent cases involving Commission regulations. *E.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1968).

[29] Apart from those suggested in the text, any regulation must be able to withstand rational basis scrutiny.

censor.[30] The Supreme Court upheld the personal attack and political editorializing portions of the Commission's fairness doctrine in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1968). Those rules were designed to invigorate public debate by requiring broadcasters to air responses to its programming in certain circumstances. The purpose of the rules is salutary.

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.

395 U.S. at 390.

Nevertheless, the fairness doctrine may well mark the outer limits of a permissible diversification policy which relies on direct government control over the content of broadcast programs.[31] The *Red Lion* Court carefully

[30] 47 U.S.C. § 326 (1970).

[31] Another limitation is contained in the factual predicate for licensing—scarcity. At present, in many cities the available broadcast spectrum is fully occupied. *See, e.g., Red Lion, supra*, 395 U.S. at 398 n.25. However, currently available technology could eliminate this scarcity. With existing equipment and technology "a single coaxial (tv) cable can carry between 28 and 36 channels of television, plus the entire AM and FM radio bands and a quantity of other nonvisual electronic signals." Smith, *The Wired Nation* 7 (1972). And in ten years it may be possible to provide each home with as many as 400 cable channels. *Id.* An innovation developed by the Bell System offers even more promise than conventional cable service. Developed primarily for telephone service, so-called "lightguides" made of broadband fiber optics have a capability of carrying 50,000 telephone calls or their equivalent on a cable one-half inch in diameter. One cable operator has begun experimental use of lightguides for television transmission, reportedly with excellent results. Broadcasting, July 19, 1976, 44.

Alleviating scarcity would not only eliminate the need for promoting diversity, it would also presumably eliminate the

withheld approval from rules that would more directly interfere with the broadcaster's First Amendment rights, such as one restricting a broadcaster from airing its own views. 395 U.S. at 367.[32]

In any event, the Constitutional difficulties with promoting diversity through speech restrictive means highlight the virtue of the prospective cross-ownership rules. The prospective ban is an attempt to promote diversity without government regulation of or supervision over speech. The rules attempt to promote vigorous public debate not by imposing restrictions on broadcasters, but simply by permitting more to be heard. Of course, there is no guarantee that the prospective ban will increase diversity in all cases, "the possible benefits of competition do not lend themselves to detailed forecast." *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1952).

need for all licensing save that necessary to prevent interference. Of course, the expense required to produce quality programming and lay cable may limit the number of voices that in fact reach each home, but such constraints are common to many businesses. Broadcasting would no longer present unique problems requiring unique regulation. This conclusion to some extent assumes, however, as the Ninth Circuit has suggested, ACLU v. FCC, 235 F.2d 1344, 1351 (1975), that the Commission can compel cable systems to be common carriers, a matter which is not, of course, before us. *See also* United States v. Midwest Video Corp., 406 U.S. 649 (1972). In any event, these hopes for the future do not diminish the importance of encouraging diversity today. This footnote reflects the views of only the author of this opinion.

[32] Such a statute might be proposed to promote public debate. One way to attempt to equalize debate is by boosting the power of the weaker voice; another way is by reducing the power of the dominant one.

But that does not make the attempt irrational.[33] It is not unreasonable for the Commission to assume that the licensing of an independent, rather than an affiliated station, offers greater hope of providing the community a new voice and to incorporate that assessment in its licensing policy. The First Amendment seeks to further the "search for truth." Surely that search will be facilitated by government policy that encourages the maximum numbers of searchers.

B. *Whether the Prospective Ban Exceeds the Commission's Authority*

The prospective rules, it is argued, cannot stand because, apart from their rationality, the Commission lacks authority to promulgate rules that restrict ownership of broadcast stations by newspapers. We hold that the prospective ban is within the Commission's rulemaking authority.

Although no provision of the Communications Act expressly grants the Commission authority to restrict newspaper ownership of broadcast stations, such express authority is not essential to the validity of Com-

[33] We also reject the argument that the prospective ban is arbitrary because it is based on one factor to the exclusion of others customarily relied on by the Commission. Courts are ordinarily uncomfortable with a claim that the "public interest" can be determined by reference to one, and only one factor. Here, however, the Commission has explained why it considers diversity to be a factor of exceptional importance and has anchored that explanation to Supreme Court decisions. Furthermore, forbidding the Commission from reasonably relying exclusively on one factor would prevent the Commission from enacting license qualifications, although it clearly has power to do so. *Storer Broadcasting, supra*; FCC v. Allentown Broadcasting Co., 349 U.S. 358 (1955).

mission regulations.[34] 47 U.S.C. § 309(a) requires the Commission to find the "public interest, convenience and necessity will be served" by the grant of a license. 47 U.S.C. § 303 (r) grants the Commission authority to "make such rules and regulations not inconsistent with law, as may be necessary to carry out" the Act while 47 U.S.C. 154 (i) grants rule-making authority to make rules "as may be necessary in the execution of [the Commission's functions]."[35] In *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1955), the Supreme Court upheld a portion of the Commission's multiple ownership rules promulgated under these provisions.[36] In essence, *Storer* permits the Commission to codify in rule its understanding, if reasonable, of the public interest licensing standard. (*See* 351 U.S. at 202-03). Here, the Commission has determined the public interest would not be served by granting broadcast licenses to newspapers and in Section II-A we held this policy was reasonable. It requires no extension of *Storer* to conclude the Commission possessed statutory authority to impose the prospective ban.[37]

[34] United States v. Southwestern Cable Co., 392 U.S. 157 (1967).

[35] In addition, the Commission cited 47 U.S.C. § 152(a), and 154(j) in support of the regulations.

[36] The regulations upheld in *Storer* placed a numerical ceiling on the number of broadcast stations a party could control.

[37] The vitality of *Storer* is attested by its application in FPC v. Texaco, 377 U.S. 33, 39 (1964), where the Court stated:

> [T]he statutory requirement for a hearing under § 7 does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived.

Storer aside, ANPA contends the Commission is disabled from enacting this rule because the Commission's first general counsel, Hampson Gary, was of the opinion that the Commission lacks the requisite statutory authority. In rejecting this contention, we need not determine what weight should be given to an agency's initial interpretation of its mandate [38] because Mr. Gary did not conclude that the Commission lacks statutory authority to enact a regulation restricting newspaper ownership. The question Mr. Gary addressed was whether "the Commission may deny an application of a newspaper for *a license* on the ground that it is against 'public policy.'" [39] After distinguishing "public policy" from the statutory standard of "public interest, convenience and necessity," [40] he concluded that a license could not be denied on public policy grounds but that newspaper ownership could bear on the public interest. Mr. Gary did not consider, as would be relevant here, whether the Commission may enact license qualifications in the public interest.[41]

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[38] *See generally*, 1 *K. Davis, Administrative Law Treatise*, § 506 (1958), (1970 Supp.).

[39] Legal Opinion of FCC General Counsel Hampson Gary submitted to the Senate Interstate Commerce Committee, Jan. 25, 1937, at 1, J.A. 239 (emphasis added).

[40] Mr. Gary defined "public policy" as:

> a term of vague and uncertain meaning, which it pertains to the law-making body to define, and courts are apt to encroach on the domain of that branch of government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. Smith v. San Francisco & N.P.R. Co., 47 Pacific 582, 489 (Cal. 1897).

[41] ANPA also argues Congress has affirmatively declared the Commission lacks authority to ban newspaper ownership of broadcast stations. Between 1946 and 1952 Congress considered legislation that would have presented the Commission from barring per se license applications from newspapers. Congress failed to enact the legislation, ANPA submits, because it believed the Commission lacked the authority in question so that the legislation would have been unnecessary.

Although this recitation of legislative history is less than persuasive, *see Order* at 56, we reject this argument on broader grounds. As the Supreme Court recognized in United States v. Wise, 370 U.S. 405, 411 (1961), the history of subsequent legislative activity is not useful in determining the meaning of the original legislation when enacted. "Statutes are construed by the courts with reference to the circumstances existing at the time of passage." *Id.* Otherwise, the meaning of a statute might never be settled, even though the statutory language had never been changed or reenacted with a different intent. Nor do the rules under review involve regulation of an industry over which the Commission lacks jurisdiction. The prospective ban simply imposes qualifications for broadcast licensees. It does not impose regulations on the conduct of the newspaper industry.

A more substantial argument is that this court already has decided the Commission lacks authority to restrict newspaper ownership of broadcast stations. The case relied on most strongly is *Stahlman v. F.C.C.*, 126 F.2d 124 (D.C.Cir. 1942),[42] where after holding that an F.C.C. subpoena was supported by the Commission's general investigative powers, the Court wrote:

> [The Commission's power] does not embrace and should not be extended by implication to embrace a ban on newspapers as such . . . . This, we think, would be in total contravention of that equality of

[42] One pre-*Stahlman* case was also relied on. In Tri-State Broadcasting Co. v. FCC, 96 F.2d 564 (D.C.Cir. 1938), the court wrote it knew of no rule or statute prohibiting a newspaper from owning a radio station. As the Commission stated in its *Order*, "We fail to see how this justifies a ban on promulgating such a rule." *Order* at 1051.

> right and opportunity which Congress has meticulously written into the Act. . . .

126 F.2d at 127.

Although this language appears to resolve the question of statutory authority, in fact it does not. First, since the Commission had not then enacted a rule restricting broadcast ownership by newspapers, the issue of statutory authority was not before the court. Consequently, as Judge Edgerton pointed out in his separate concurrence, the quoted language is dicta. 126 F.2d at 128.

More significantly, the premise of the paragraph containing the quoted language is that "[t]he Communications Act requires no more of an applicant than proof of citizenship, character, and financial and technical qualifications to operate in the public interest." *Id.* at 127. The next sentence implies that any applicant meeting these qualifications must be granted a frequency if one is available. However, this view of the Commission as a "traffic cop" of the airwaves was rejected by the Supreme Court the next year in *National Broadcasting Co., supra.* In order "to secure the maximum benefits of radio to all the people of the United States . . . Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio." 319 U.S. at 217. Thus *Stahlman* was based on a reading of the Commission's Act that has not prevailed.[43]

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[43] *Stahlman* was cited with approval in McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C.Cir. 1956), *cert. denied*, 353 U.S. 918 (1957), where the court held the Commission could attach decisive significance to media diversification in a comparative renewal hearing where the applicants were indistinguishable on the basis of the Commission's other comparative criteria. The court did not consider whether the Commission could, *if it chose to*, base a rule exclusively on diversification.

In sum, *Storer* supports the Commission's exercise of rulemaking power and none of the materials cited requires a different conclusion.

C. *Whether the Prospective Ban Violates the First Amendment*

It is argued that the prospective ban unconstitutionally conditions the First Amendment right to publish a newspaper.[44] It is not argued, as indeed it could not be, that the ban violates the First Amendment rights of newspaper owners as would-be broadcasters. Denial of a license application does not abridge the applicant's First Amendment rights. *F.R.C. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933), *National Broadcasting, supra*, 319 U.S. at 226. "No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" *Red Lion supra*, 395 U.S. at 389, quoting *National Broadcasting*, 319 U.S. at 227. Of course, it does not follow that the First Amendment has no role in the licensing system. The Commission may not use the licensing process as a censoring mechanism, choosing those applicants whose views it favors.

> Congress did not authorize the Commission to choose among applicants upon the basis of their political,

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[44] It was also argued in the briefs that the prospective ban violates equal protection. This argument was based primarily on Morey v. Dowd, 354 U.S. 457 (1957), which was overruled between filing of the briefs and argument, City of New Orleans v. Dukes, 44 U.S.L.W. 5075. At argument, counsel noted this fact and evidently abandoned the equal protection argument. In any event, we see no merit in it. As explained in Section II-A, *supra*, there is a rational basis for the rule, and, as this section makes clear, strict scrutiny is not required because the ban does not trench on protected First Amendment interests.

> economic or social views . . . If it did, or if the Commission by these regulations proposed a choice among applicants on some such basis, the First Amendment issue before us would be wholly different.[45]

National Broadcasting, 319 U.S. at 226. But no claim of censorship can be made here. The Commission has only decided that the public interest is better served by assigning available broadcast frequencies to those without a co-located major media voice.

Freedom of the press does not necessarily shield newspaper publishers from regulation that may make publication more difficult. A newspaper could not, for example, plausibly claim the federal income tax violates the First Amendment because payment of the tax makes publica- more difficult, or perhaps impossible. *See Associated Press v. United States, supra.* So the question presented is not whether the prospective ban burdens newspapers—it clearly may do so—but rather whether there is something special about the burden that renders it unconstitutional. The relevant case law does not support such a contention.

In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Supreme Court held unconstitutional a state tax on net receipts imposed only on newspapers with weekly circulations of over 20,000. Justice Sutherland, writing for the Court, likened the tax to those imposed by the British on the American colonies in order to suppress dissent. *Id.* at 246-49. The tax was bad, he wrote because it was "a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled." *Id.* at 250. Here, the purpose of

[45] *See also*, 47 U.S.C. § 326; *Red Lion*, 395 U.S. at 390; Brandywine-Main Line Radio v. FCC, 473 F.2d 63 (Bazelon, C.J. dissenting); Kalven, *Broadcasting and the First Amendment*, 10 J. LAW & ECON. 15, 43-44.

the Commission's prospective regulation is precisely the opposite.[46] The rule is intended and reasonably designed to increase the diversity of information an opinion circulated by increasing the number of media voices in the community. Neither *Grosjean* nor the other cited cases are controlling.[47]

The ANPA admonishes us to heed the warning uttered by the Supreme Court in *Miami Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974);

> Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitation . . . *Id.* at 256.

However, a restraint is not unconstitutional merely because it is unfamiliar. Unable to claim the ban violates

[46] *Grosjean* may be a shaky precedent because it seemingly calls for judicial inquiry into the legislature's intent. United States v. O'Brien, 391 U.S. 367, 384 (1967). This is less difficult with respect to agency regulations because agencies must provide a statement of the regulation's purpose. 5 U.S.C. § 554(c).

[47] Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186 (1945), is mistakenly cited for the proposition that legislation can never single out newspapers for special treatment. In fact, that issue was never reached. The case held, largely on the authority of Associated Press v. United States, 326 U.S. 1 (1945), that the Fair Labor Standards Act could be applied to any business, including newspapers. After noting the First Amendment does not forbid regulations which do not restrain expression, the Court said the case did not involve the issue of special treatment raised in *Grosjean*. And an argument based on Speiser v. Randall, 357 U.S. 513 (1958), also fails. *Speiser* involved a statute that conditioned a property tax exemption on the signing of a loyalty oath. The statute was invalidated not because it conditioned the exemption on the oath, but because the oath proscribed constitutionally protected speech. This was held to be a penalty for engaging in free speech. The prospective ban, however, does not regulate let alone punish any speech and thus is not invalid under *Speiser*.

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their First Amendment rights as would-be broadcasters, petitioners have not demonstrated the ban trenches on the constitutionally protected interests of newspaper publishers.[48] The ban neither mandates nor prohibits what may be published. It only forbids the formation of co-located combinations the Commission has determined do not serve the public interest. Of course, in serving the public interest the ban may indirectly affect the economics of publication, but the First Amendment does not provide a shield against this. *Associated Press*, 326 U.S. at 20.

In fact, the very claim of constitutional abridgement is ironic. First of all, the prospective ban is an attempt to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech. Second, it may be that newspapers can not truly be free of government interference so long as they operate government licensed broadcast stations. An unsavory fact of life is that government has the power to regulate expression by a "raised eyebrow" reminding the broadcaster of the triennial government renewal process. A newspaper opens itself up to similar intimidation by affiliation with a broadcast station.[49] "It

[48] The principle of least restrictive alternatives, it is also argued, precludes the Commission from imposing a flat ban on future combinations. This argument contains a useful insight, but misapplies it. Systematic licensing of speakers itself severely strains free speech. Thus it is entirely appropriate for the Commission to attempt to restrict the access of the smallest possible number. Arguments that the ban is an unconstitutional prior restraint or overbroad are also unpersuasive.

[49] "The main, main thing is The Post is going to have damnable, damnable problems out of this one. They have a television station . . . . And they're going to have to get it renewed." Taped Statement of Richard Nixon to H. R. Haldeman and John Dean, Sept. 15, 1972, quoted in Senate

would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . ." *Associated Press*, 326 U.S. at 20.

* * * *

In conclusion, we affirm the validity of the prospective ban. We find that the ban is a rational attempt to promote the highly valued goal of diversity, that it is within the Commission's authority and that it does not violate the Constitution. We now turn to the issues regarding the Commission's treatment of existing combinations. However, before considering whether the divestiture scheme actually ordered by the Commission can be upheld, we must evaluate the arguments that the Commission may not enact any rule that orders divestiture without an evidentiary hearing.

III. Whether the Commission May Adopt Any Rule That Orders Divestiture Without an Evidentiary Hearing

From the premise that divestiture, as retroactive legislation, is inherently suspect, it is argued that divestiture is permissible only if Congress specifically intended for the Commission to enact retroactive rules and only where, quoting from the *Order* at 1083, "the need is overwhelming and the evidence is unambiguous." [50] This

Select Comm. on Presidential Campaign Activities, Final Report. S.Rep. No. 981, 93d Cong., 2d Sess. 149 (1974).

[50] This argument is made even though past divestiture orders have been approved under ordinary standards of review. In addition to the divestiture ordered as a result of the multiple ownership rules enacted in the 1940's, *see* text and notes at notes 6-7, *supra*, the Commission has adopted rules prohibiting networks from having cable interests and telephone

argument fails in light of *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624 (1966), where in upholding CAB regulations that affected existing licenses, this court en banc rejected an argument "that the *Storer* doctrine is restricted to regulations affecting applications for new licenses or certificates. . ." *Id.* at 628. The court said "such rule making is not to be shackled, in the absence of clear and specific Congressional requirement." *Id.* at 629. Authority to order divestiture follows not only from the fact that *American Airlines* is based on *Storer Broadcasting*, which interpreted the Communications Act, but also from the fact that the interest in a broadcast license is limited and conditional. A licensee must apply for renewal of authority every three years, and the renewal application is subject to such rules and conditions as are in effect, not during the license period, but at the time of the renewal. *Transcontinent Television Corp.*. 308 F.2d 339 (D.C. Cir. 1962). Consequently, the contention that divestiture contains elements common to suspect retroactive legislation goes not to the existence of Commission authority, but rather to the reasonableness of its exercise.[51]

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companies from owning cable systems in their service areas. In Iacopi v. FCC, 451 F.2d 1142, at 1147 (1971), the Ninth Circuit discussed the network cable divestiture rule with approval and in General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (1971), the Fifth Circuit affirmed the telephone cable divestiture rule.

[51] It may be that Commission licensing rules are valid only if they contain waiver provisions. In *Storer* the Court quoted with approval language from *National Broadcasting* that "The Commission provided that 'networks will be given full opportunity, on proper application . . ., to call to our attention any reasons why the principle should be modified or held inapplicable.'" 351 U.S. at 192 quoted 319 U.S. at 207. It is not clear whether the Court saw the waiver provision as necessary for affirmance or simply as evidence of reasonableness. In any event, there is every reason to believe that any divestiture order of the Commission will be accompanied by an appropriate waiver provision.

Section 309(e) of the Act, 47 U.S.C. § 309(e), requires the Commission to grant an applicant a hearing if unable to make the public interest finding required to grant a license. NAB advances the argument, seemingly foreclosed by *Storer* and *National Broadcasting*, that a divestiture rule violates the statutory right to a hearing. Although it is not entirely clear, the basis of this argument appears to be that *Storer* and *National Broadcasting* apply only to potential licensees not existing ones. However, as *American Airlines* suggests, these cases are not dependent on a distinction between current and potential licensees and nothing presented to us suggests why this distinction should be read into them.[52] Furthermore, divestiture would not be as harsh as denial of license renewal. A licensee facing divestiture is compensated for its loss. A licensee that fails of renewal is not.

While recognizing that the Commission has broad discretion to proceed by rulemaking or adjudication, and that it may affect the rights of individual licensees without first holding an evidentiary hearing, Gray Broadcasting argues that the Commission abused its discretion by ordering divestiture without affording affected parties a prior evidentiary hearing. Gray contends the

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[52] This Court's decision in Citizens Communication Center v. FCC, 447 F.2d 1201 (1971) does not forbid the Commission from ever denying a license without a hearing. In *Citizens*, the Commission's policy statement on comparative hearings was invalidated because it improperly denied a full hearing to qualified license challengers. The *Citizens* court carefully distinguished its disapproval of a policy of denying hearings to qualified applicants from *Storer's* approval of denying hearings to unqualified applicants. 447 F.2d at 1212, n. 34. As Section II makes clear, it is reasonable for the Commission to consider newspapers as "unqualified" to acquire licenses in the city of publication.

Commission has couched as rulemaking a proceeding that in "substance and effect is individual in impact," in other words an adjudication. The APA defines rule as "any agency statement of general *or particular applicability* and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 1001(c). Professor Davis points out that the words "or particular" were inserted after Senate passage "to assure coverage of rule making to named persons." *Davis, 7 Administrative Law* § 5.02 (1958). The nature of the evidence required to implement a rule, and not the particularity of application, determines the necessity for individualized hearings. Given our disposition of the case, however, we need not determine whether a divestiture order limited to the seven affected licensees could have been implemented without individualized hearings.[53]

In sum, the Commission has authority to promulgate a rule that orders divestiture. An altogether different question, to which we now turn, is the reasonableness of the scheme under review.

IV. Validity of the Divestiture Rule Adopted by the Commission

Since the Commission purported to limit divestiture to "egregious cases" of "effective monopoly," we must examine the record support for this determination. *Greater Boston Television Corp. v. F.C.C.*, 44 F.2d 841,

[53] Implementation of certain divestiture rules might require individual evidentiary hearings. If, for example, the Commission were to adopt on remand a policy of requiring divestiture where combinations have over 30% of the market in the community of operation, it would presumably be necessary to determine the market shares of given combinations by hearing. Across-the-board divestiture could, on the other hand, be implemented without hearings, apart from waiver proceedings.

850 (1970). The purpose of our review is only to determine whether the agency decision is rational and based on consideration of the relevant factors, *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 146; *Bowman Transportation v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); whether, in terms of the APA, the agency decision is arbitrary and capricious. 5 U.S.C. § 706(a)(A). Technically, there is no requirement that the rules be based on substantial evidence. Cf. 5 U.S.C. § 706(2)(E). Nevertheless, a decision must be considered "arbitrary and capricious" if the facts on which it is purportedly based are not supported by the record. *Associated Industries of New York State, Inc. v. U.S. Dept. of Labor*, (487 F.2d 392, 349-50 (2d.Cir. 1973) (Friendly, J.). Factual certainty is not necessary, though. An agency may regulate even though the facts do not illuminate a clear path. *Ethyl Corporation v. EPA*, 541 F.2d 1 (D.C.Cir. 1967). But it stands to reason that presumptions derived from the enabling statute and fundamental national policies taken on redoubled importance where this is so.

A. *Record Support for the Divestiture Order*

The voluminous record of the lengthy rulemaking proceeding contains little reliable "hard" information. Many filings are devoted to legal argument or representations that the editorial staff of the filer's newspaper and television station are internally segregated. In addition, roughly twenty-five major studies were submitted.[54] However, as the Commission brief points out, the studies were largely inconclusive. Br. at p.9, n.b.

We summarize the record only to the extent necessary to show that in determining its divestiture policy, the

[54] *See Order* at 1093-94 for a listing.

Commission necessarily had to rely primarily on policy, not factual considerations.[55]

(1) Effect of Common Ownership on Station Performance

Several studies attempt to demonstrate either that newspaper ownership of television stations has not harmed the public interest or, affirmatively, that newspapers have been superior broadcast licensees. The Anderson study[56] is largely of the former variety. It attempts to compare patterns of content under different ownership conditions to determine if cross-ownership produces "repressive information control," evidently on the assumption that the purpose of diversity policy is to combat such repression. The study finds no significant difference in content between individually and cross-owned stations in the sample cities and concludes divestiture is unnecessary.[57] Although the study has an objective format, it is based on content analysis that necessarily entails subjective judgments.[58]

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[55] We follow the Commission's categorization, even though, as the Commission recognized, the categories overlap. *Order* at 1072-73.

[56] J. Anderson, Broadcast Stations and Newspapers: The Problem of Information Control: A Content Analysis of Local News Presentation, filed July 2, 1971, also published in J. Broadcasting 51 (1971).

[57] *Id.* at 44-45. The study also finds that cross-owned television stations depend less heavily than individually owned stations on wire services for their stories. On this basis it concludes "newspaper-allied stations appear to be better recommended." *Id.* at 46. One commentator, however, suggests this phenomenon might be due to the fact that cross-owned stations rely heavily on their sister newspapers for information. Barnett, A Critique of, and Supplement to, the Prospective Reports of the Rand Corporation at 7 (Sept. 23, 1974).

[58] Cox Broadcasting submitted studies similar to Anderson's dealing with markets in which it operates. W. McDougal & E. Sasser, Atlanta Market News and Editorial Research Study; J. Anderson & D.C. McDaniel, Two Studies: A Historical Analysis and A Content Comparison for Cox Broadcasting Corporation's Affiliated News Media in Dayton, Ohio (May 17, 1971).

The Litwin and Wroth study,[59] commissioned by the NAB, compares media performances in highly concentrated and relatively unconcentrated cities. Relying on information acquired in interviews, it finds that cross-owned stations are perceived to provide greater amounts of news coverage in greater depth than individually owned stations. In part, it attributes this superiority to greater financial stability. However, the interviewers only polled high-ranking "media personnel" and "business and community leaders."[60] Furthermore, the difficulties with an approach based on popular perceptions is highlighted by the fact that the study reports a pervasive history of news distortion and bias in one of the three highly concentrated cities examined.[61]

The Commission undertook a study[62] that compares the performance of cross and individually owned stations, but without making judgments based on content analysis. A complex multiple regression analysis finds that cross-owned stations present "6% more local news, 9% more local non-entertainment, and 12% more total local including entertainment than do other TV stations." This study, the *Order* concludes, shows "an undramatic but nonetheless statistically significant superiority in newspaper owned television station in a number of program particulars." *Order* at 1078 n. 26. However,

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[59] G. Litwin & W. Wroth, The Effects of Common Ownership on Media Content and Influence (Aug. 4, 1969).

[60] *Id.* at 1-1 to 1-2, 4-4.

[61] *Id.* at 2-9.

[62] *Order* at 1094 *et seq.*, appendix C.

the Commission did not stress this superiority in deciding to grandfather most stations. Comparing amounts of programming types aired, not only requires qualitative judgments in categorizing the programs, but would also seem to be a crude measure of the public interest. More broadly, as Commissioner Robinson asserted in his dissent, it is inconsistent for newspapers to assert that they make superior broadcasters while at the same time claiming that their affiliated stations are totally independent. *Order* at 1119.

An empirical study which employed data drawn from the Commission's files attempts to determine if cross-owned stations differ from other stations in the amounts of news and other public interest programming they air.[63] According to the Commission, this study finds "no significant differences." A study by Harvey Levin [64] reaches the opposite conclusion. He finds that individually owned stations "systematically outclass" affiliated stations in their levels of public interest programming. However, several filings severely criticize Levin's methodology [65] and, although he later attempted to correct the deficiencies,[66] the Commission termed his results "inconclusive." *Order* at 1073.

Finally, the American Institute conducted a study to determine whether cross-ownership affects the level of

[63] Comment of Students' FCC Study Group (May 17, 1971).

[64] H. J. Levin, The Policy of Joint Ownership of Newspaper and TV Stations: Some Assumptions, Objectives and Effects (April 12, 1971).

[65] National Association of Broadcasters Reply Comments and Arguments on the Proposed Rules, Appendices B, C and D (August 18, 1971).

[66] H. Levin, Research Memorandum on the Economic and Programming Effects of Newspaper Ownership of Television Stations, Supplementary Comments at 4 (May 15, 1974).

public knowledge.[67] It finds the public in Zanesville, Ohio, a town with media "monopoly," significantly less informed than the public of a "similar" city, York, Pennsylvania, a town with a competitive media. The Institute attributes this difference to media monopoly. It is possible, however, that factors other than media monopoly contribute to or explain the results. In fact, this study highlights the difficulty of attempting to compare the performances of cross- and independently-owned stations. As Commissioner Robinson observed in his dissent:

> We ought not to assume that the kind of "goodness" we really want in a station is measured simply by diversity among different program types, the relative percentage of situation comedies, news, public affairs and the like. On the other hand, it is about the only way we can get any kind of objective handle on program quality, without getting into the business of making subjective valuations of programming content, a course that, needless to say, raises grave First Amendment problems.

Order at 1121.

(2) Effect of Common Ownership on Competition

Comparing advertising rates provides the most ready means for determining whether cross-ownership in general has an anti-competitive effect. Rosse *et al.*[68] purport to find that newspaper-owned television stations charge advertising rates 15% higher than other stations, presumably due to their monopoly position. However, their

[67] American Institute for Political Communications, Washington, D.C., 1971, The Effects of Local Media on the Mass Mind. This study was never officially filed, although the Commission discussed it in the *Order* at 1073.

[68] J. Rosse, B. Owen, & D. Gery, Economic Issues in Joint Ownership of Newspaper and TV Media (June 1, 1970).

calculations assume that audience size lacks explanatory value because it is a "dependent variable"; in other words, they assume that since advertising prices determine programming quality which in turn determines audience size, audience size cannot explain advertising rates.

In a NAB-commissioned study, Lago and Osborne challenge this assumption.[69] Employing audience size as an explanatory variable in a regression analysis, this study finds no significant difference in advertising rates. The Commission did not indicate which methodology it accepted; it merely noted that its own examinations failed to confirm Rosse's conclusion.[70] *Order* at 1073.

Apart from these studies, the Commission noted that the record did not contain evidence of specific anti-competitive acts by cross-owned stations. However, Stephen Barnett suggested before the Commission that such evidence—as well as evidence regarding the impact of cross-ownership on station performance—is available, though difficult to uncover.[71] Pointing to examples from the Commission's cases, the Litwin and Wroth report [72]

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[69] A. M. Lago & D. P. Osborne, A Quantitative Analysis of the Price Effects of Joint Mass Communications Media Ownership, RMC Report UR-150-A (March 9, 1971).

[70] The nature of this examination is not clear from the record.

[71] S. Barnett, reply comments (August 19, 1971); S. Barnett, "Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary Markle Foundation" (Sept. 23, 1974). It is strenuously contended that the latter submission was not part of the administrative record and hence should not be considered on appeal. However, as much of the report consists of discussion of cases in the public record, we see no harm in taking notice of it.

[72] *See* note 59 *supra*.

and other documented sources, Barnett described several instances where multiple-media owners had abused their power. Typical abuses were news suppression, news distortion and advertising discrimination that presumably would have been less feasible in a more competitive market.

The Commission did not mention these or other examples of abuses in its summary of the record,[73] although Commissioner Hooks noted that Barnett's position was supported by several other submissions. *Order* at 1109 (Hooks, Comm., concurring in part). The Commission's focus was on national trends, and it may have felt uncomfortable drawing conclusions about an entire industry from apparently isolated examples. However, former Commissioner Johnson has expressed the opinion that the majority of media abuses remain uncovered. *In re National Broadcasting Co.*, 19 F.C.C. 2d 713, 720-723 (dissenting opinion). In his view, this is caused by lack of written records, the difficulty of separating the elements of self-interest and news judgment, and the fact that station managers rarely resort to overt, documentable pressures.

(3) Multiplicity and Diversity of the Media.

The record contains several studies designed to measure media diversity. Sterling's study reports that the proportion of newspaper-owned broadcast stations has declined since 1950.[74] However, it examines only the top 100 markets. Furthermore, it may understate the amount

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[73] During the pendency of Docket 18110, the Commission deferred petitions to deny renewal applications alleging undue economic concentration. The Justice Department had filed several such petitions. *Order* at 1080, n.29.

[74] C. H. Sterling, Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets: 1922-1967 (March 5, 1971).

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of current concentration. In gauging concentration, radio and television stations are equated even though the Commission had noted in its notice of proposed rulemaking that TV and newspapers are by far the most powerful media sources.[75] Thus the study would show that a town originally served only by a cross-owned television-newspaper combination had become significantly less concentrated by the addition of a radio station, even if the co-located combination remained the dominant voice. Udell's study reaches a conclusion similar to Sterling's. It finds that the percentage of newspaper-owned television stations dropped from 29% in 1955 to 14% in 1969.[76] This study may simply reflect, however, the fact that the number of broadcast outlets increased during this period while the number of newspapers decreased, a finding also made by Sterling.[77]

The Seiden study attempts to measure precisely the amount of diversity in communities throughout the coun-

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[75] 22 F.C.C.2d at 346. The Litwin-Wroth study, *supra* n.59, was one study that reached this conclusion. *See also* studies cited at 22 F.C.C.2d at 344.

[76] J. Udell, Economic Consequences of FCC Proposal and Critique of Relevant Literature, submitted by the ANPA.

[77] The NAB argues that it is unnecessary and hence arbitrary for the Commission to impose restrictions on affiliations since market forces are eliminating whatever problem exists. This position is unpersuasive. First, since none of the studies demonstrates why cross-ownership has declined, continuation of the trend cannot be confidently predicted. Consequently, there is no way to predict how long it will take for cross-ownership to finally die out. More importantly, there is no reason why the Commission cannot act to accelerate a natural trend. And this argument has an ironic ring in light of the claims that divestiture would disrupt the continuity necessary for quality broadcasting.

try.[78] Choosing the Area of Dominant Influence[79] as the relevant geographic area instead of either the city, country or Standard Metropolitan Statistical Area, it counts the number of media competitors and owners that serve each area and finds that no area is served by less than thirty media owners.[80] However, the count includes numerous media that have little or no bearing on local diversity, such as newspapers from other cities and national magazines. The count contains other distortions as well. A television station and its satellites are treated as individual outlets even though they provide the same service. The Commission characterized this study as "totally unrealistic." *Order* at 1079, n.28.

In concluding its discussion of these studies, the Commission expressed doubt as to whether "counts" as such generated valuable knowledge. *Order* at 1074. Also, the Commission's brief disparages the conclusion of the Justice Department brief that the media is highly concentrated in many cities. In thirty Standard Metropolitan Statistic Areas (SMSAs) involved in this case, Justice observes, only one newspaper circulates. "In twenty others there are only two daily newspapers, and in eleven of these the newspaper which owns a television station has more than 75% of the SMSA's newspaper circulation. Computed from Rand Corporation Study R-1585-MF." And, Justice continues, "metropolitan areas which

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[78] N. H. Seiden & Associates, Mass Communications in the United States (Jan. 29, 1971).

[79] The concept of the Area of Dominant Influence (ADI) was designed by the American Research Bureau to reflect advertising markets. Every county in the continental United States is assigned to one of 204 ADI's. Seiden, *supra* n.78, at 4. An ADI thus may encompass a large geographic area.

[80] New York City showed 610 media outlets while Meridian, Mississippi, which the Commission characterized as an "egregious case," showed 109 media outlets.

in theory have several newspapers, in practice usually have only one or two with significant circulation." Br. at 20. Such figures, the Commission points out, do not establish that the broadcast industry is anti-competitive.

(4) Economic Consequences of Divestiture

The economic consequences of divestiture involves two questions: the extent to which investors themselves will be injured and the extent to which this injury will be translated into public injury. Two major studies deal chiefly with the first question, none with the second.

Commissioned by the ANPA, the Frazer-Gross study [81] and the First National City Bank study [82] both suggest most combination owners will divest their television stations, at less than current value. In particular, Frazer estimates that under divestiture conditions, TV stations will sell at 10% to 20% less than true value. In response, Justice contends this conclusion is premised on the erroneous assumption that broadcast licensees do not compete in the investment market with other non-broadcast income-producing properties.[83] Furthermore, even assuming the validity of Frazier's judgment, it does not follow that the sales price will not include a substantial profit margin.[84] Finally, since investment demand and license demand may fluctuate during the five year

[81] Frazer, Gross Associates, Valuation of Newspaper Owned TV and Radio Stations.

[82] First National City Bank, Financial and Investment Issues of Forced Divestiture.

[83] Comments of the United States Department of Justice, pp. 32-33 (1971).

[84] The Commission evidently assumed that the forced sales would be accomplished at a gain. The Commission offered to certify sales for special treatment under 26 U.S.C. 1071, *Order* at 1025, n.45, a provision only applicable to gains.

sale period, it is difficult to forecast loss figures accurately. The Commission concluded, "Our own evaluation is that the concern [over losses] may be exaggerated." *Order* at 1072.

No studies dealt with whether the public would be injured by the economic consequences of divestiture. Various comments, however, predict divestiture will produce harmful side-effects such as reductions in local ownership or the demise of marginally profitable newspapers contrary to the intent of the Newspaper Preservation Act.[85] Such suggestions are little more than speculations.[86]

B. *Whether the Commission May Properly Require a Showing of Tangible Harm to Support Divestiture*

Putting aside for the moment the question whether the Commission abused its discretion in refusing to order divestiture absent a showing of tangible public interest harm, we first consider whether the Commission's evaluation of the record was reasonable.

Despite the fact that it did not systematically evaluate the record, the Commission evidently concluded that the factual case for broad-scale divestiture had not been made. At one point the *Order* implies that the Justice Department failed to demonstrate that cross-owned stations charged anti-competitive advertising rates, *Order* at 1079 n. 27, and later it observes "it might have been necessary . . . to require divestiture in many more situations [i]f the power of the print-broadcast combination were exercised monolithically." *Order* at 1089. Also, after mentioning its power to act in the absence of documented abuses, the Commission nonetheless concluded that such "considerations are [not] a substitute for the

[85] P.L. 91-353, 84 Stat. 466 (1970).

[86] *See* text and notes at notes 94-104 *infra*.

requirement of a stronger showing than we have of the need for such a severe remedy on a broad basis." *Order* at 1080, n.29.

Furthermore, the Commission reasonably could have concluded, as it evidently did, that a compelling factual showing was unlikely to be made. The Commission not only received roughly 200 original submissions, but, when dissatisfied with the substantiality of these filings, there were 48 fresh filings in response to a detailed request. 45 F.C.C.2d 768. As a whole, the submissions suffered from what may have been unavoidable failings.[87] Diversity and its effects are, as Commissioner Robinson suggested, elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds. And the process suggested by Professor Barnett's filing did not offer much more hope of compiling a useful record. Former Commissioner Johnson has suggested that specific abuses of cross-ownership are unlikely to be apparent. And, as Judge Tamm has explained elsewhere, documentation of such abuses, "would require not only program monitoring but also perusal of reams of documentary evidence which will likely be dispersed, inaccessible and unintelligible to one who is not skilled in the intricacies of antitrust and communications law." *Hale v. FCC*, 425 F.2d 556, 565 (D.C.Cir. 1970) (Tamm, J., concurring). Furthermore, the intrusiveness involved in the very process of attempting to uncover abuses—such as news distortion—might severely strain First Amendment values.

On the other hand, the *Order* does not emphasize that the record does not support the reasons adduced for

[87] An antitrust rather than First Amendment focus might have facilitated compilation of a useful record. This does not, however, invalidate the Commission's chosen emphasis.

grandfathering either. There is virtually no evidence regarding the likelihood that divestiture would produce the harmful effects feared, or how serious any such harm would be. And the record no more establishes that cross-ownership serves the public interest than injures it.[88] After years of study, the record was essentially inconclusive.[89]

Had the evidence pointed strongly one way or another, the Commission probably would not have considered whether it should order divestiture absent a showing of tangible harm. Having concluded that the record was inconclusive, the Commission recognized that it nonetheless had the power to order divestiture. *Order* at 1080, n.29. Had the Commission reasoned that because diversified ownership is prima facie in the public interest, local cross-ownership violates the public interest, it would have been rational for it to conclude that divestiture was generally called for, subject to any appropriate exceptions. The Commission did not adopt this view, however.[90] "Di-

[88] One attempt to assess statistical studies on the effects of media concentration concluded neither side in Docket 18110 had adduced sufficient quantitative evidence to completely "prove" its case for harm or benefit. Bear, Geller, Grundfest & Posner, *Concentration of Mass Media Ownership* (RAND, Sept. 1974) at 79.

[89] The Commission evidently shares this assessment. In its brief it observes that most of the studies were inconclusive. Br. at 9, n. 6. The firmest conclusion drawn by the Commission was that an "overwhelming need" for divestiture had not been shown. The Commission did not point to items in the record that supported its decision to grandfather most stations.

[90] The most natural reading of the Commission's *Order* is that the burden of persuasion was placed on the proponents of divestiture. A strained, though possible, reading is that the burden placed on the opponents was met by the mere existence of competing policies. However, as will be shown,

vestiture," the Commission wrote, "is a harsh remedy, one to be reserved [sic] only where the need is overwhelming and the evidence unambiguous."[91] *Id.* at 1083. Thus the question before us is whether the Commission acted properly in refusing to order divestiture in the absence of a showing of tangible public interest harm.

Having evaluated the policies and record presented to us, we hold that the Commission erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture. Divestiture, to begin with, is a misleading term in this context. It implies that the broadcaster has that which the Communications Act specifically states he does not have—an interest in the license beyond its expiration date—and that he is being forcibly deprived of a vested right. A licensee must apply for renewal of his license every three years and the Commission is to grant renewal only if it finds it is in the public interest to do so. 47 U.S.C. § 307(d).

With this in mind, it is easier to understand that even though divestiture is typically a remedy for misconduct, it is actually a much more flexible tool. Divestiture need not only be used to take the licenses from those who disserve the public interest. As with the Commission's early Chain Broadcasting and Multiple Ownership rules,[92] divestiture could be employed *to in-*

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see text and notes at notes 108-109 *infra*, the record contains no evidence anchoring the competing policies to the grandfathered combinations. Thus it would have been unreasonable to conclude the presumption against cross-affiliation had been met.

[91] Although this premise, if valid, would have supported some form of limited divestiture, it would not have supported the limited divestiture actually ordered. That is because no evidence supports the line drawn by the Commission.

[92] *See* text and notes at notes 6-8 *supra*.

crease the extent to which the broadcasting industry serves the public interest. As the Commission recognized, "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." *Order* at 1079-80. Although divestiture cannot guarantee greater diversity, it increases the likelihood that the public will be served by broadcasters with diverse views. Thus the Commission's obligation to "encourage the *larger* and *more* effective use of radio in the public interest," 47 U.S.C. § 303(g) would support the presumption that cross-owned stations do not serve the public interest.

The policies of the First Amendment also support this presumption. Because the right of access to the airwaves of some would-be broadcasters has been restricted, the public is deprived of speakers it would otherwise hear. As a result, the Supreme Court has said "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion, supra*, 395 U.S. at 390. And the interests of the public is presumed to be in maximum diversification of the airwaves. The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all." *Associated Press v. United States*, 52 F. Supp. 362, 372 (1943).

Finally, and perhaps most importantly, the Commission's long-standing policy has been that diversification of media sources is of central importance.[93] It reaffirmed this view throughout the proceeding under review. "If our democratic society is to function, *nothing* can be more important than insuring that there is a free flow

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[93] *See* text and notes at notes 6-9 *supra*.

of information from as many divergent sources as possible." *Order* at 1079 (emphasis added). Of course, the Commission probably did not intend for this and similar statements to be read literally. If if had, it presumably would not have allowed itself even to consider whether other policies ever called for waiver. But at the least, consistency would call for ordering divestiture absent a showing of greater public interest harm.

The Commission did not do this, however. Although purporting to reaffirm the primacy of diversity, *e.g.*, *Order* at 1078, the *Order* ultimately did not adopt the presumption that cross-ownership does not serve the public interest, divestiture only being ordered where "the need is overwhelming and the evidence unambiguous." *Order* at 1083. The Commission never explained that or why it had abandoned the presumption suggested in the notice of proposed rulemaking. It simply cited the existence of competing policies it claimed not to have previously considered.

The first competing value is preservation of local ownership and involvement of ownership in management. The Commission expressed fear that "many sales would have to be to outside interests." *Order* at 1078. However, as the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395-96 (1965), makes clear, local ownership by itself is of little concern to the Commission.[94] Owner management is significant because it increases the likelihood that station policy will be attuned to local needs; local ownership by itself offers no such promise.[95] And even when both are present, they are not of primary importance to the Commission. A licensee may sell its license without regard to whether the new owner intends to participate actively in management. Br. of Justice Dept. at 39, F.C.C. Reply Br. at 19 n.15.

[94] Although by its terms the 1965 *Policy Statement* applies only to comparative renewal hearings, the Commission has regarded it as an expression of general policy. *See* note 9 *supra*.

See also, Community Broadcasting Service, Inc. v. FCC, 2 FCC 2d 53 (Rev. Bd., 1966), *aff'd*, Community Broadcasting Service, Inc. v. FCC 377 F.2d 143 (D.C. Cir. 1967); Mid-Florida Television Corp., 33 FCC 2d 559 (Rev. Bd.), *aff'd* 37 FCC 2d 559 (1972), *rev'd on other grounds*, TV 9 Inc. v. FCC, 495 F.2d 929 (1973), *cert. denied* 419 U.S. 986 (1974).

In addition, the record does not support the theory that divestiture will impair local ownership and management. The Justice Department asserts and the Commission does not deny that nineteen, or roughly one quarter of the 79 newspaper-television combinations at issue, are not locally owned. In those cases divestiture may spark improvement. Furthermore, no evidence was presented that the local owners of the other stations are actively involved in daily management. Since "[m]ost of the parties state that their broadcast stations and newspapers have separate management, facilities, and staff. . ." *Order* at 1059, it may be that owner management is unusual. Finally, there is no reason to suppose that local entrepenuers will not find television an attractive investment.[96]

[95] "We are primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." 1965 *Policy Statement, supra*, 1 FCC 2d at 395.

[96] *See* text accompanying note 102 *infra*. An argument evidently rejected by the Commission is that because large stations are so expensive, divested stations would be purchased primarily by group owners who would thereby accumulate undue power. It is not clear that this chain of events would transpire. And in any event, non-concentrated group ownership might constitute an effective bulwark against the power of the networks. *See Bazelon, FCC Regulation of the Telecommunications Press*, 1975 DUKE L. REV. 213, 238.

The second fear is that divestiture might disturb "continuity of operation . . . as the new owner would lack the long knowledge of the community and would have to begin raw." *Order* at 1078. As support, the Commission brief cites judicial decisions giving recognition to the fact that "legitimate renewal expectancies are implied in the structure of the Communications Act" Rep. Br. at 15. The goal of certainty is to give broadcasters an incentive to make the investment required to produce quality programming. Whatever the legitimate strength of this policy in light of the statutory limitation on the interest in a license,[97] it has scant force in this case. A one-time alteration in the ownership structure of the broadcast industry should not effect the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity.[98] Furthermore, to the extent the Commission means that transfer of ownership is by itself disruptive, its position is at odds with its practice of routinely approving license assignments.[99] Finally,

[97] "No such license shall be construed to create any use beyond the terms, conditions and period of the license." 47 U.S.C. § 301. *See* Fidelity Television, Inc. v. FCC, 515 F.2d 684, 705 (Bazelon, C.J., statement as to why he voted to grant rehearing en banc), (D.C. Cir. 1975).

[98] Of course, the public interest would be affected if the old licensees were "better" than their replacements. But the Commission cites no reason to believe that the new licensees will, in the long run, be inferior.

[99] There is some dispute regarding the number of transfers routinely approved by the Commission. Justice asserts that in the six years prior to the *Order*, the Commission approved without hearing 678 license assignments. Br. at 42. The Commission replies that almost 60% of these were pro forma assignments, such as "transfers to relations because of death, minority stock." Re Br. 18. Even assuming that such transfers are inconsequential, the number of other transfers suggests that "disruption" is not ordinarily a major concern for the Commission.

even if transfer to non-local owners entails extraordinary disruption, there is no basis for assuming that such transfers will result from divestiture.[100]

The final fear is that "[l]ocal economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too." *Order* at 1083. Although it is not entirely clear, the Commission presumably was not concerned with financial hardship to the individual owners.[101] Private losses are a relevant concern under the Communications Act only when shown to have an adverse affect on the provision of broadcasting service to the public. *Federal Communications Commission v. Sanders Radio Station*, 309 U.S. 470, 474-76 (1940); *Carroll Broadcasting v. F.C.C.*, 258 F.2d 440 (1958). Yet, as Commissioner Robinson theorized in his dissent, *Order* at 1127, divestiture should not even produce substantial *private* losses. Most cross-owned stations are held by their original owners who by now have long recouped their original investment. *Order* at 1130.[102]

[100] Commissioner Robinson pointed out that holdovers in high-level management often smooth the transition period. "Indeed, any other action by the new licensee would only reduce the value of his franchise." *Order* at 1128.

[101] There are, however, passages that suggest that this was the Commission's concern. "[D]ivestiture introduces the possibility of . . . hardship for individual owners." *Order* at 1078. In addition, the Order suggests that because some combinations were formed when broadcasting was not profitable, it would be unfair to deny continued operation to those owners now that it is. To the extent such a policy underlies the Commission's decision, it is impermissible. Licensing is to be in the public, not private interest.

[102] Commissioner Robinson noted that some more recently formed combinations might not have yet returned their original investment. With respect to these, he concluded, "I am unwilling to assume that the public interest compels us to

In its brief, the Commission claims that its concern was the effect divestiture would have on future programming. It reasoned that because broadcasting stations are expensive, new owners would have insufficient working capital to finance news and other public affairs programming. Rep. Br. at 20. But presumably this would also be the case in voluntary transactions, which the Commission readily permits. A different public interest injury that might result from separation is the failing of marginal newspapers no longer supported by affiliated broadcast stations.[103] However, the Commission did not rely on this point and, as Commissioner Robinson pointed out, the record contains no reliable information on the degree to which stations subsidize newspapers. *Order* at 1129.[104]

In sum, the Commission could not have rationally concluded that the competing policies it offered justified grandfathering absent a show of harm. And, since the record does not disclose the extent to which divestiture would actually threaten these values, the Commission could not have rationally concluded, if it did, that their potential impairment overcame the presumption against

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ratify the licensee's expectation that its three-year license constitutes a perpetuity which should not be revoked when other, and weighty, public interest considerations may require it." *Order* at 1130.

[103] It is often assumed that the demise of the *Boston Herald* was caused by the revocation of the license of its wholly owned subsidiary, WHDH TV. Order at 1107 (Lee, R., Comm., concurring).

[104] Furthermore, if it appeared likely that a newspaper would fail as a result of divestiture, the Commission could reasonably conclude that the public interest called for waiver. *See* International Shoe Co. v. FTC, 280 U.S. 291, 302-303 (1930).

cross-ownership.[105] The gains in diversity from divestiture may be speculative, but since divestiture is the most promising method for increasing diversity that does not entail governmental supervision of speech,[106] the Commission could not rationally conclude that lesser policies, lacking support in the record, require maintenance of the status quo.[107] "In passing upon considera-

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[105] Terre Haute Broadcasting Co., 25 FCC 2d 348, 353-55 (1970); Policy Statement on Comparative Broadcast Hearing, 1 FCC 2d 393, 394 (1965). *See* WHDH, Inc., 16 FCC 2d 1, 12-13 on recon., 17 FCC 2d 856 (1969), *aff'd* Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 444 F.2d 841, 859-60 (1970), *cert. denied*, 403 U.S. 923, 91 S. Ct. 2229, 29 L. Ed. 2d 701 (1971); Lorain Community Broadcasting Co., 13 FCC 2d 106, 114, recon. denied, 14 FCC 2d 894, rehearing denied, 15 FCC 2d 388 (1968), review denied, 18 FCC 2d 686 (1969), *aff'd*, Allied Broadcasting, Inc. v. FCC, 140 U.S. App. D.C. 264, 435 F.2d 68, 69 (1970); Ultravision Broadcasting Corp., 11 F.C.C. 2d 394, 410-11 (1968); *aff'd*, WEBR, Inc. v. FCC, 136 U.S. App. D.C. 316, 420 F.2d 158 (1969). *See generally* TV 9, Inc. v. FCC, 161 U.S. App. D.C. 349, 495 F.2d 929, 938 (1973), *cert. denied*, 419 U.S. 986, 95 S. Ct. 245, 42 L. Ed. 2d 194 (1974).

[106] *See* text accompanying notes 30-32 *supra*.

[107] Justice offers as a separate grounds for reversal the Commission's failure to accord greater weight to antitrust considerations, particularly competition for advertising revenues. Although antitrust policy is relevant to the "public interest, convenience, or necessity" standard, as the Commission recognized it is only one component of a broader mandate. *Order* at 1079. United States v. Radio Corporation of America, 358 U.S. 334 (1959); Northern Natural Gas Co. v. FPC, 399 F. d 953 (D.C. Cir. 1968). In deference to the strong authority in support of this proposition, Justice now claims the Commission should have given the antitrust laws "prima facie effect." However, the Commission was well within its discretion on rejecting Justice's suggestion, regardless of its label.

tions open to the Commission even on an application for renewal of a license this court has taken a stand against heavy reliance on the status quo." *TV 9, Inc. v. F.C.C.*, 394 F.2d 929, 937 (D.C.Cir. 1973).[108]

In any event, even if the Commission's chosen presumption were supportable, its current policy could not stand. First, the record does not support the conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets. Nor does it show that the need for divestiture in the affected markets is "overwhelming" and the evidence "unambiguous." Although the affected markets contain

[108] The *Order* not only leaves the status quo largely intact, it solidifies the position of existing combinations by making petitions to deny more difficult. Without reasoned discussion, the Commission has abandoned its former policy of allowing petitioners to deny the opportunity to demonstrate in any one of several ways that cross-ownership harms the public interest. *See* note 21, *supra*. The Commission's decision to substitute an antitrust standard for this open-ended test is inconsistent with the *Order's* emphasis on First Amendment considerations. Furthermore, it unreasonably curtails the interests of petitioners to deny. The Commission's decision to grandfather as the rule rather than the exception was based largely on its conclusion that the rulemaking record did not contain evidence documenting the harmful nature of cross-ownership as a general matter. Had this policy been supportable, it would have been logical for the Commission to encourage showings of harm in individual markets, rather than effectively to prohibit it. In fact, the Commission itself seems to recognize the deficiencies of this standard. The Commission recently set for hearing the renewal of WGAL-TV, exclusively on the issue of cross-ownership "abuses" that do not constitute violations of the antitrust laws. Renewal of WGAL-TV, 39 RR2d 457 (1976). In passing, the Commission noted that it has neither the "expertise" or "experience" to enforce the antitrust laws and that it would be "inappropriate" for it to duplicate the functions of those agencies that are expert, *id.* at 463.

fewer voices, the amount of diversity in communities with additional independent voices may in fact be no greater. The Commission "must do more than enumerate factual differences, . . . it must explain the relevance of those differences to the purposes of the Federal Communications Act." *Melody Music v. F.C.C.*, 345 F.2d 730, 733 (D.C.Cir. 1965).

Finally, limiting divestiture to small markets of "absolute monopoly" squanders the opportunity where divestiture might do the most good. There is no apparent technological reason why additional broadcasters could not be licensed in many of the smaller markets.[109] In many large markets, on the other hand, newspapers possess highly coveted VHF licenses.[110] Divestiture thus may be more useful in the larger markets. The Commission's arbitrary cut-off at one independent in-coming signal prevents realization of such gains.[111]

Conclusion

Although we do not disturb the Commission's prospective rules, we conclude that the divestiture order is inconsistent with its longstanding policy that "nothing

[109] Because of geographic proximity, the Commission cannot always assign the maximum number of frequencies to each city.

[110] "Currently, nearly every available VHF frequency is assigned and in use, ..." Federal Regulation and Regulatory Reform, Report of the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Dec. 6, 1976.

[111] This is not to say that the Commission's focus on local news was improper. That focus seems entirely appropriate in light of the number of media voices concerned with national affairs.

can be more important than insuring that there is a free flow of information from as many divergent sources as possible." The Commission has sought to limit divestiture to cases where the evidence discloses that cross-ownership clearly harms the public interest. For the reasons expressed above, we believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.[112] Accordingly, we vacate such portions of the *Order* that have retroactive effect and remand the record to the Commission for adoption of a rule not inconsistent with this opinion.

It is so ordered.

[112] Such cases could be accommodated through a waiver procedure. The *Order* contains an excellent discussion of the circumstances in which such waivers might be appropriate. *See Order* at 1085.

Appendix B

FCC 75-104

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTIONS 73.34, 73.240, AND 73.636 OF THE COMMISSION'S RULES RELATING TO MULTIPLE OWNERSHIP OF STANDARD, FM, AND TELEVISION BROADCAST STATIONS	Docket No. 18110

SECOND REPORT AND ORDER*

(Proceeding Terminated)

(Adopted January 28, 1975; Released January 31, 1975)

BY THE COMMISSION: COMMISSIONERS LEE, REID, AND WASHBURN CONCURRING AND ISSUING STATEMENTS; COMMISSIONERS HOOKS AND ROBINSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING STATEMENTS; COMMISSIONER QUELLO ISSUING A SEPARATE STATEMENT.

1. The Commission has before it the *Further Notice of Proposed Rule Making* in this proceeding (22 F.C.C. 2d 339 (1970)) and responsive filings by numerous parties. Also under consideration are updated written filings and additional information presented during two and a half days of oral argument, pursuant to an invitation of the Commission given March 7, 1974 (45 F.C.C. 2d 768). A list of filing parties appears in Appendix A.

2. The proceeding began March 27, 1968, with the adoption of a *Notice of Proposed Rule Making* (33 Fed. Reg. 5315). Broadly speaking, the notice proposed rules proscribing common ownership of broadcast stations in different broadcast services in the same market (i.e., no common ownership of TV–AM, or TV–FM, or AM–FM.)[1] The proposed rules were prospective in nature, i.e., they did not contemplate divestiture of existing facilities but were to apply only to applications to construct new facilities or to acquire existing facilities.

3. A *First Report and Order* was adopted on March 25, 1970 (22 F.C.C. 2d 306). The rules promulgated therein were modified somewhat in a *Memorandum Opinion and Order* adopted February 26, 1971

*A synopsis of the actions taken can be found in Appendix G.

[1] Before the proceeding was initiated, the rules governing common ownership of broadcast stations in the same market prohibited such ownership in the *same* broadcast service if certain coverage contours overlapped. They permitted common ownership of stations in *different* broadcast services in the same market. Hence a single licensee was permitted to own an AM–FM–TV combination licensed to serve the same community. Moreover, the rules contained no prohibition of common ownership of newspapers and broadcast stations in the same market. However, as a matter of policy expressed in the Commission's multiple ownership rules and elsewhere, the Commission did examine concentrations of ownership in the same geographic area on an *ad hoc* basis in both comparative and non-comparative situations. These examinations gave consideration to broadcast and non-broadcast interests, such as newspapers.

(28 F.C.C. 2d 662), which disposed of petitions for reconsideration of the *First Report and Order*. These new rules prohibited common ownership of VHF television stations and aural stations in the same market. They permitted AM–FM combinations and they provided that all applications involving common ownership of UHF and aural stations would be treated on a case-by-case basis. They did not require divestiture, but did require that if the owner of a VHF station and one or two aural stations in the same market sold, he could not sell the TV and the aural stations to the same party. They did not cover common ownership of newspaper and broadcast stations.[2]

4. On the same date that the *First Report and Order* was adopted, the Commission also adopted a *Further Notice of Proposed Rule Making* (22 F.C.C. 2d 339) which contained a proposal as to common ownership of broadcast stations and of daily newspapers and broadcast stations in the same market. The proposal would require divestiture, within five years, to reduce one party's holdings in any market to one or more daily newspapers, or one television broadcast station, or one AM–FM combination. Under the proposal, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned in that market within one year or by the time of its next renewal date, whichever is longer. No grants for broadcast station licenses would be made to owners of one or more daily newspapers in the same market. Comments were also invited on whether divestiture should be required with regard to AM–FM combinations so that no party could own such a combination unless he had made a showing that the two stations were for economic or technical reasons so interdependent that one could not be sold without the other.[2]

5. Although not unprecedented, the idea of divestiture of ownership was a departure from the typical Commission approach of limiting any new rules to prospective effect. As a consequence of the incorporation of this facet of the proposal, the question of the impact on industry structure was introduced. Moreover, because of the differences between prospective and retrospective proposals, each needs to be examined separately and tested against appropriate criteria.

6. *Response to the Proposal.* As could be expected, our proposal generated a great deal of interest and provoked a sizable number of

[2] Under these rules, a TV station and an AM station were considered to be in the same market if the Grade A contour of the TV station encompassed the entire community of license of the AM station or if the 2 mV/m contour of the AM station encompassed the entire community of license of the TV station. With regard to TV and FM stations, the Grade A contour was used for TV and the 1 mV/m contour was used for FM. As to AM–FM combinations, they were considered to be in the same market if the 1 mV/m contour of the FM station encompassed the entire community of license of the AM station or if the 2 mV/m contour of the AM station encompassed the entire community of license of the FM station. With certain exceptions, the *First Report and Order* proscribed the formation of new AM–FM combinations in the same market and prohibited the sale of such an existing AM–FM combination to a single party unless a special showing were made that for technical or economic reasons the stations had to be operated in combination. The aforementioned *Memorandum Opinion and Order* (at 670–672) reversed the prohibitions against forming AM–FM combinations or selling existing combinations to a single party. In so doing it indicated that the subject of common ownership of AM and FM stations in the same market would be explored in the phase of the proceeding commenced by the *Further Notice of Proposed Rule Making*. It also indicated that, as an effective alternative to diversification of ownership, the Commission intended to explore the possibility of amending the AM–FM program duplication rule (§ 73.242) in such a way as to provide more non-duplicated programming over commonly owned AM and FM stations in the same area. A proceeding has since been begun to explore this possibility (*Notice of Proposed Rule Making*, Docket No. 20016, 39 Fed. Reg. 14228 (1974)).

filings. Most were directed to the question of newspaper-broadcast ownership, with most parties opposing rule changes but a number supporting them. Some approached the issues from the point of view of anti-trust economic analysis; others stressed the diversity of viewpoint aspect. In addition, some parties discussed AM–FM combinations or television-radio combination divestiture.

7. Factual differences between situations also affected the nature of the views expressed in a filing. Thus, for example, as to newspapers, at one end of the continuum was the daily newspaper-television combination which faced multiple competitors of both media, and at the other end was the joint holding of the only TV station and daily newspaper in a market. Whether in terms of economics or viewpoint diversity, parties differed on the weight to be given other media (for example news magazines) received in the market but originating elsewhere. So too with the weight to assign other local media such as weekly newspapers and outdoor advertising or direct mail. Although important factual differences were noted, a parallel method of evaluating the situation regarding daily newspaper-radio combinations could be found in the pleadings.

8. *Legal Authority.* The *Further Notice* (at para. 48) invited comments or legal briefs on the Commission's authority to adopt the proposed rules. Several parties responded to this invitation concisely or at length. We have concluded that we have authority to adopt the rules both as proposed and as promulgated by the present document. A discussion of this subject follows:

9. The Commission has authority to adopt rules governing the issuance of broadcast licenses which would prohibit cross-ownership of newspapers and broadcast stations in the same area in furtherance of our long standing policy of promoting diversification of ownership of the electronic mass communications media. Statutory authority is found in Sections 2(a), 4(i), 4(j), 301, 303, and 309(a) of the Communications Act of 1934, as amended. Section 309(a) specifically requires the Commission to find that the granting of a license serves the public interest, convenience, and necessity. The term public interest encompasses many factors including "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

10. Our diversification policy is derived from both First Amendment and anti-trust policy sources. See, e.g., *Associated Press* v. *United States*, 326 U.S. 1 (1945), *supra*, affirming 52 F. Supp. 362 (S.D.N.Y. 1943) (L. Hand, J.); *Citizens Committee to Save WEFM* v. *FCC*, —— F. 2d ——, (D.C. Cir., Oct. 4, 1974), (concurring opinion of Bazelon, C.J. at 6). The Federal Courts have consistently upheld our use of these grounds in efforts to promote diversity of control over the electronic media of mass communications. In its earliest opinions construing the Communications Act, the Supreme Court recognized that regulation of broadcasting was designed to preserve competition and prevent monopoly. *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474–76 (1940). The Supreme Court said in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390: "It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization

of that market, whether it be by the Government itself or a private licensee". The Court then concluded: "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." 395 U.S. at p. 390. In *Mt. Mansfield TV Inc.* v. *FCC*, 442 F. 2d 470 (2nd Cir. 1971) the Court upheld our prime time access rule as being consistent with our obligations under the First Amendment to promote diversity of program sources.

11. Although the Commission is not empowered to enforce the anti-trust laws, it may properly take cognizance of anti-trust violations and anti-trust policy in performing its public interest licensing function. *United States* v. *RCA*, 358 U.S. 334 (1954). In expanding on this point in RCA, the Supreme Court said in dicta:

> Moreover, in a given case the Commission might find that anti-trust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication. See 98 Cong. Rec. 7399; *Mansfield Journal Co.* v. *FCC*, 86 U.S. App. D.C. 102, 107, 108; 180 F. 2d 28, 33, 34.

Anti-trust policy has been recognized as a correlative source of authority for our diversification policy because requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices. However, these two sources of our diversification policy are not always present to the same extent nor do they apply with equal force in every case. Our prospectively-applicable rule with respect to future newspaper-broadcast combinations in the same city draws its support principally from our First Amendment concern. Our divestiture order applied to "egregious" cases in which the only newspaper and the only broadcast station in a city are co-owned is founded upon both concerns. While we have proceeded by a different course than one based strictly on a market analysis, the fact is we have in effect used a geographic market in writing our new rules and have considered daily newspapers and stations as part of the same product market.

12. In November 1953 we adopted rules limiting the number of broadcast stations a person could own to five VHF television stations and seven AM and FM stations. We asserted authority to make regulations limiting concentration of stations under the same control. The United States Supreme Court upheld these regulations in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

13. In recent rule making proceedings the Commission has adopted rules prohibiting networks from having any cable interests and telephone companies from owning cable systems in their service areas. The Courts accepted our action in both instances. *Iacopi* v. *F.C.C.*, 451 F. 2d 1142 (9th Cir., 1971); *General Telephone Co. of the Southwest* v. *U.S.*, 449 F. 2d 846 (5th Cir., 1971).[3]

[3] The issue in *Iacopi* was whether a divestiture plan complied with our rules rather than a direct attack on the validity of the rule itself. However, the Court did say: "The Commission has determined that network divestiture of CATV and syndication interests will increase competition and foster independent sources of TV programming. We defer to that interpretation." 451 F. 2d at 1147. See also the concurring statement of Judge Tamm of the United States Court of Appeals for the District of Columbia. "The pending rule making proceedings (Docket No. 18110) offer some hope that the Commission will finally come to grips with the grave problem inherent in the rising concentration of ownership in the mass media." *Hale* v. *F.C.C.*, 425 F. 2d 556, 566 (D.C. Cir., 1970).

14. The sound public policy of placing into many, rather than a few hands, the control of the broadcast medium guides us in the licensing of the use of the radio spectrum. This basic principle, enforceable in *ad hoc* proceedings or through rule making, applies to the judgment of whether an individual application should be granted as well as to the comparison of competing applicants. *United States* v. *Storer Broadcasting Co.*, *supra; Clarksburg Publishing Co.* v. *F.C.C.*, 96 U.S. App. D.C. 211, 225 F. 2d 511 (1955); *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 89 U.S. App. D.C. 13, 189 F. 2d 677 (1951), *Cert. den.* 342 U.S. 830; *Plains Radio Broadcasting Co.* v. *FCC*, 85 U.S. App. D.C. 48, 175 F. 2d 359 (1949). It is the policy behind our one-to-a-market rules adopted in the *First Report and Order, Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 F.C.C. 2d 306 (1970). The significance of ownership from the standpoint of "the widest possible dissemination of information" lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest.

15. Despite the overwhelming authority supporting our proposed action, numerous parties have challenged our jurisdiction to take any action interfering with the rights of newspapers to own broadcast stations. The American Newspaper Publisher's Association (ANPA) advanced the major legal arguments against such a rule in their exhaustive and comprehensive filings with the Commission.

16. They first challenge our authority on constitutional grounds citing the First and Fifth Amendments to the United States Constitution. ANPA claims we are attempting to inhibit a newspaper owner's freedom to publish by preventing him from having an interest in broadcast stations. This argument fails for two reasons. First, the Commission is following the long established policy of promoting the widest possible dissemination of information from diverse and antagonistic sources . . ." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). Second, the First Amendment does not protect business relations that are either unlawful or not in the public interest. Finally, we believe the opponents overstate their case in this and in the other arguments. The Commission has never proposed and is not now proposing to prohibit someone from owning a newspaper and a television station. It is plain that what we are doing is grandfathering present newspaper-television owner combinations; we are only requiring divestiture in egregious cases (see Appendix D and paras. 112–122, *infra.*) These divestitures are to take place over a five-year period and in order to avoid any possible future harm, we shall entertain waiver petitions.

17. ANPA contends such rules violate the Fifth Amendment because we are discriminating against a class. Rules that treat in an equal manner all parties whose activities raise similar public interest problems are not discriminatory. Since broadcast licenses confer no property rights, the Commission may cancel them provided it affords due process to the licensee. *Radio Commission* v. *Nelson Bros. Radio*, 289 U.S. 266 (1933). Discrimination is by definition, the arbitrary and capricious classification of entities by irrelevant standards. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). We need not confer licenses on a carefully

defined class provided that we determine our action is consistent with the public interest.

18. The ANPA brief also cites an opinion by former General Counsel Hampson Gary, written in 1937, purporting to hold the Commission cannot deny a broadcast license to someone solely on the ground they published a newspaper. That opinion is not relevant to the consideration of Docket No. 18110 for four reasons. First, it was written in the context of a comparative proceeding. Second, it dealt with the broader question of *any* newspaper as opposed to the more limited consideration of one city. Third, prior statements by a regulatory agency as to its jurisdiction are not determinative of the legality of subsequent efforts to assert the same jurisdiction.[4] Finally, the problems of cross ownership and concentration of media ownership are much different in 1974 than in 1937.

19. The opponents of the adoption of the rules have called to our attention several attempts by Congress in the early fifties to prohibit the Commission from "discriminating" against newspaper owners in license proceedings. They contend Congress failed to enact legislation because of assurances by the Commission that it had no intention of "discriminating."

20. The opponents are apparently referring to then Chairman Hyde's testimony during hearings on the 1952 Amendments to the Communications Act. In view of the fact that the Commission prior to this testimony had taken newspaper ownership into account in denying applications, *Scripps-Howard Radio, Inc.* v. *FCC*, *supra* and *Plains Radio Broadcasting Co.* v. *FCC*, *supra*, the then Chairman's testimony could not have reasonably been taken as an indication that newspaper ownership by a potential licensee was of no concern to the Commission. It is also clear that an agency's view of the extent to which its public interest mandate requires it to take newspaper ownership into account can change over the years. Thus, the Chairman's testimony in 1952 concerning the Commission's views on what policy best serves the public interest does not mean that the agency is excused from its continuing responsibility to seek to further the public interest which may cause it to reach a different conclusion twenty-two years later. Finally, it should be noted that our proposed action does not bar newspapers as a class from becoming licensees. We merely propose to prevent common ownership in the same area. Thus, we believe it is impossible to discern any mandate from either Congress' action or inaction.

21. Several Court cases are cited in support of our lack of authority to promulgate these rules. In *Tri-State Broadcasting Co.* v. *FCC*, 96 F. 2d 564 (D.C. Cir., 1938) the court stated it knew of no rule or statutes prohibiting a newspaper from owning a radio station. We fail to see how this justifies a ban on our promulgating such a rule. ANPA relies most heavily on *Stahlman* v. *FCC*, 126 F. 2d 124 (D.C. Cir., 1942). That case upheld our authority to issue a subpoena as part of our investigatory powers. It also contained considerable dicta such as "there is nothing in the Act which either prevents or prejudices the

[4] See e.g., *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 169–170 (1968). The Commission once had doubts about its own jurisdiction in the field of CATV but changed its position in the mid-sixties.

right of a newspaper, as such to apply for and receive a license to operate a radio broadcast station." 126 F. 2d at 127. This statement deals with newspaper owners in general and is not related to the issues in this proceeding. Judge Edgerton noted in a concurring opinion that the court was not deciding the issue of crossownership.

22. ANPA also cites the case of *McClatchy Broadcasting Co.* v. *FCC*, 239 F. 2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) where a newspaper owner seeking a television station in the same city lost in a comparative proceeding. The Court said newspaper ownership was not a *disqualifying* factor standing alone but the case did not deal with that issue in a rulemaking proceeding.

23. Finally, the opponents have said we do not have authority to order immediate divestiture and that even if we did, such a remedy is so harsh it should be sparingly used. This argument begs the question. The Commission has a very unusual licensing scheme in that, unlike other agencies, we must re-evaluate each license every three years. We cannot renew a license unless we determine that to do so is in the public interest. In this connection we have determined that in certain egregiously concentrated markets the public interest requires divestiture. However, we have applied the divestiture over a five-year period in order to minimize disruption.

COMMON OWNERSHIP NOT INVOLVING NEWSPAPERS[5]

24. *The Arguments.* Most of what little discussion there was on the subject of common ownership of broadcast stations in the same market was opposed to prohibitions on AM–FM combinations or divesting any existing radio-television combinations.

25. Because of the Commission's decision to focus on the subject of newspaper-television combinations at the oral argument, most of the parties gave little attention in their recent filings to the other matters which had been included for consideration in the proceeding. A number did mention their agreement with the Commission's decision to give principal attention to the subject of newspaper-television combinations. Many thought that, in addition to not posing problems from a diversification point of view, existing radio-television combinations or AM–FM combinations served an important function. Particularly emphasized was the need of an FM station to rely on an existing AM station in order to underwrite the losses which were sustained while the companion FM station was being established. A similar point was made regarding the cash flow radio stations generate which could be relied upon by a fledgling UHF television station. From a philosophical point of view, too, there was support for permitting such combinations. The main thrust in that regard was that there was no basis for believing that coownership of radio and television stations in a locality was detrimental to the public interest. In effect, these parties took the position that absent a persuasive showing of harm, there was no reason for the Commission to act to terminate such common ownership. Overall the networks pointed to the im-

[5] A few parties mentioned radio-television as well as AF–FM combinations and their comments are included in this section.

portance of the owned and operated stations to the network operations. ABC and CBS stressed the importance of permitting existing radio ownership to continue, particularly in terms of the negative impact on network radio operations that a splitting of common ownership would have. NBC asserted that existing radio-television combinations should be transferable jointly.

26. A notably different point of view was expressed in the joint filing on behalf of the Civil Liberties Union of Alabama and The Selma Project. Quoting the Commission to the effect that a public interest basis need be shown in order to overcome the importance of diversification which would otherwise call for separate ownership, this pleading urges the separation of AM and FM station ownership. They see no basis for giving different treatment to ownership of an AM and FM station in a locality from that given ownership of two AM or two FM stations there. While acknowledging the advantage that increased non-duplication (as proposed by the Commission) would have in terms of ending waste of spectrum space, they nevertheless insist that two, separately programmed, stations under common ownership do not advance the cause of diversity. In their view, diversity is most important in the smallest of communities where the nonduplication rule may not even be applied, for it is there that choices are usually most limited. Nor do they find persuasive the argument that there would be a resultant diminution in the quality of radio programs if ownership of AM and FM stations were separated. Not only do they believe that independent FM stations could do just as well, they discount the notion that much current programming has any real merit. Finally, they contend that continuation of AM–FM combinations would effectively preclude minority group ownership.

27. Westinghouse believes that newspaper-television ownerships are a more significant problem than aural-visual ownerships, and that aural-visual separation would disrupt and downgrade service. Cosmos Broadcasting Corp. agrees with the view that there is no need for divestiture of commonly owned radio and television stations and that TV-newspaper ownerships are the more significant aspect of the diversity problem, because other broadcast services are "substantially less significant" sources of news and public affairs information.

28. Affected parties argue that broadcast stations in Alaska are in a unique economic situation which is caused by the isolation and distance of Alaska from the mainland of the U.S., the limited and sparse population of the State and the need for quality service. In addition, they assert that the operating costs of Alaskan stations are higher because all supplies must be shipped a long distance from the lower 48 states and that living costs in Alaska are also much higher than the average in the U.S., resulting in higher wages and salaries, the single highest expense item in operating a broadcast station. TV Broadcast Financial Data for the year 1973 for the city of Anchorage (the only Alaskan city covered by the reports) show that the figures for the three television stations showed an operating loss of $718,673. Similarly, the FCC data on AM and FM stations indicate that in 1972 Alaska was the only state where the radio stations as a whole reported a loss for the year.

29. Not only Alaska but stations in Montana should also be exempt from the proposed divestiture rules we are told. The argument is that Montana is a large, sparsely populated State with a depressed economy which, nevertheless, has to absorb costs of construction and operation which are as high in Montana communities as those in larger markets. Thus, it is asserted, being able to split the costs between television and radio stations contributes to profitability and stability. Divestiture, it is said, would not necessarily increase diversity, for in one particular market one of three assigned VHF channels is inactive, one of three FM channels is inactive and both assigned UHF channels are inactive.

30. *Conclusions.* The issues presented by joint ownership of radio and television facilities in a given market have already been partially resolved. The present rules adopted in an earlier phase of this proceeding bar the creation of such combinations but they do not require separation of existing ownership except through sale to separate owners when they are in fact sold. We were offered no basis for taking any action to divest any existing combination, nor do we see any such basis for requiring divestiture in the larger markets. Moreover, we do not believe that we need to follow the policy of separating ownership in smaller markets as we have been urged to do. In reaching our decision in this regard we examined all cases where one party owned the only television and the only radio stations in a community. In all instances [6] save one, there was at least one city-grade signal from outside that encompassed the city. Separately owned daily newspapers also served some of the communities. As with the newspaper aspect of this proceeding, we considered this sufficient to demonstrate the presence of a full-fledged competitor and hence that no divestiture was required. As to the remaining case, Zanesville, Ohio, where there is no encompassment, the licensee has sold its daily newspaper and it too faces a full-fledged competitor. Accordingly, we shall not make any change in the standards applicable to this aspect of multiple ownership.

31. While it was not the principal focus of the current section of this proceeding, the subject of AM–FM combination ownership is properly before us and in need of resolution. Three major avenues are open. We could act to bar only future combinations, could seek to end existing combinations as well or could act instead through a non-ownership method. There can be no question that wholesale disruption would attend any effort at divestiture. Even if it could be demonstrated (and this record in no way does so) that this would not be an insuperable obstacle, other impediments remain. The state of FM has indeed improved over the years, but much has been due to the pioneering efforts of AM licensees who were encouraged by us to enter the FM market. More than this, it is by no means clear that FM stations can yet be expected to stand on their own.[7] Some of course do but many cannot.

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[6] In our view the situation in Alaska is unique and we agree with the arguments expressed earlier on the need to exempt stations there. Also, the list of monopolies excludes satellite stations as they are not full-fledged stations themselves and are vulnerable to challenge by a party wishing to operate independently. The very fact they are not now independent suggests that the locality cannot support competing services.

[7] In the non-duplication notice of proposed rule making (mentioned at the end of footnote 2) we reported on our observations regarding recent developments in the economic position of FM stations. In essence, the data support the idea of separation of programming but fall short of demonstrating that all FM stations can stand on their own.

Unlike the program duplication question addressed later, separation of ownership ends all economies of scale.[8] Whether prospective or retrospective, we do not believe that a separation of ownership is consonant with the current state of the medium. Divestiture could silence a number of stations or leave them too financially weak to offer full service. Even prospective rules could slow growth in FM broadcasting. This is not to say that the idea of diversification is of no importance, but it does not depend on such a barrier to all combinations. Rather, if a license for an unused FM channel is worth seeking, others besides AM licensees will step forward, and under our 1965 Policy Statement on comparative hearings, diversification is the most important single issue governing the choice of who is to succeed in a hearing. Thus, the new, non-multiple owner, entrant has a real advantage. On the other hand, where none steps forward, there is a real reason to doubt that the situation would be different if a prospective barrier existed. Thus, the major effect of any such rule would be to stunt growth where it is most needed and only an AM licensee is ready to proceed or to do the really unnecessary where others already have an interest and a distinct advantage in a hearing. With this in mind, we put the issue to rest and shall not adopt rules in this area.[9]

32. What then of the "single aural service" concept? Does the above discussion portend a change in the Commission's view? The answer is no. The fact that we are not proceeding now to divorce AM and FM ownership does not indicate that other appropriate steps to further our policy goals are not warranted. Just as we have taken the presence or absence of FM station coverage into account in the new AM allocation rules,[10] so can we proceed in furtherance of the policy in the area of program non-duplication. We have expressed the view that simultaneous presentation of identical programs on two stations in a community is wasteful of scarce spectrum space. Even if separation is not feasible, extension of non-duplication restrictions may well be. Clearly, if this is done, more program choices will be available to the listener. While no decisions have yet been made on how to resolve the issues raised in the non-duplication proceeding, it is clear that such action as is appropriate in the area of AM–FM combinations should come through such means. Therefore, we shall not adopt rules to bar future AM–FM combinations when the result would be to affect, in many instances, the places where separate FM operation is least likely. Unless there were wholesale divestiture of existing AM–FM combinations, a future prohibition would only require separate ownership of the channels least likely to be viable under separate operation. Only extensive divestiture would provide for separate ownership of just those channels most likely to be worthwhile separately. Even if this makes sense theoretically, the cost would be too high, the cure worse than the disease.

[8] E.g., use of common studio, same staff, side mounting of FM antenna on AM tower.
[9] Since such a conclusion must as always rest on the facts then obtaining, it does not necessarily follow that there never would be a time when separation is necessary. If such a time occurs, we can act; it is clearly not now.
[10] 39 F.C.C. 2d 645 (1973).

NEWSPAPER OWNERSHIP—ECONOMIC CONSEQUENCES

33. Much of the discussion relating to daily newspaper-television station common ownership in the pleadings was approached from the point of view of anti-trust considerations. To aid in understanding the nature of the questions thus presented the succeeding paragraphs in part follow an anti-trust oriented arrangement. In addition, a number of pleadings were directed to the question of diversity of viewpoints as it related to newspaper-broadcasting common ownership. These arguments will be discussed separately.

34. *Relevant Product Market.* When the possibility of garnering too large a share of the market suggests that an anti-trust issue may be raised, there are two initial aspects to consider. The first is the product line or the line of commerce in an economic sense. Sometimes there are difficulties in establishing what is the market because of the dispute which exists regarding the substitutability of products. To give an example: if a steel company seeks to acquire an aluminum company, does this constitute a form of horizontal integration leading perhaps to impermissible oligopolistic concentration? To answer the question requires among other things a determination of the relevant product market, and, in this example, a knowledge about the conditions under which aluminum or steel could be used as substitutes for one another, either generally or in some particular uses. Establishing the relevant product market or line of commerce is one of the most intricate areas of anti-trust law to apply.

35. The dispute here centers on whether newspapers and television stations are part of the same product market, or in other words are competitors.[11] In anti-trust terms this is a basic question, for if they are not, then the cross ownership which exists does not suggest that owning both would lead to owning a larger share of the same market. According to the Department of Justice, newspapers and television stations are in many ways engaged in the same business, namely attracting audiences and selling them to advertisers. While it does acknowledge that the two are not interchangeable for all advertisers, it asserts that the two are far more alike than they are different. It also contends that there is a public interest in preserving competition between products which are physically distinct but are commercially substitutable for certain classes of customers. Since Justice sees newspaper and television advertising as interchangeable, it would define the product market so as to include newspapers and television stations.

36. A number of other parties have expressed a contrary view on the subject. It is their reading of pertinent cases that newspapers and television stations constitute separate lines of commerce. The principal distinction mentioned by these parties seems to be based on differences in the kind of advertising carried by each—the newspaper being mostly a vehicle for local advertising with television stations carrying mostly national (or at least regional) advertising. They also mention a distinction in usage, with television being capable of conveying motion, activity and emotional ambience and newspapers being needed for the presentation of extensive factual information that television

[11] A similar comparison is made between newspapers and radio stations.

can present only in fragmentary pieces or for uses that do not extend beyond a simple brief exposure.

37. *Relevant Geographic Market.* To evaluate the economic implications of the situation requires knowledge not only of the product line but of the geographic confines involved as well. Depending on where the geographical line is drawn, the situation could be much altered. Generally speaking, as the area enlarges, the part of the market belonging to the company in question drops as other economic entities are included in the market share calculations. The subject is not the simple one it may seem, as there are a number of ways to go about the determination. Thus, as parties have pointed out, even the Commission has approached the subject differently at different times. In the *Frontier* case,[12] the Commission dealt with the question through the use of the city and environs as the relevant geographic market rather than the much larger Grade B coverage area of the television station in question. Later, when considering the *Chronicle* case,[13] the Commission used the station's Grade B contour.

38. As might be expected, the parties favoring divestiture urge a narrower geographic confine for use in a Commission determination, and those opposing divestiture urge a broader one employing Grade B coverage or ADI for the television station and for newspapers the similarly extensive primary market area or the city and retail trade zone. In the Department of Justice filings against the renewal applications for several stations, the thrust of its pleading here has been followed, with use of a market in no case larger than the equivalent of a city and its suburbs.[14] Conversely, the opposing parties urge the Commission to apply its own standards and to reject as artificially contrived the market concepts of the Department of Justice.

39. *Market Share of Newspaper-Television Station Combinations.* Certain facts mentioned by the parties are not in dispute. Daily newspapers tend to be much larger enterprises than television stations. Radio stations are significantly smaller than either. Moreover, few cities have competing daily newspapers, so that from the point of view of advertising revenues, a daily newspaper-television station combination would inevitably garner a sizeable portion of the total local advertising revenues. The dispute, then, centers on the importance of these economic facts in terms of Commission policy goals. Also, to what extent should the Commission take into account the multiplicity of media exposures from magazines and other sources, in determining the degree of concentration? The Department of Justice points to a Roper study that indicated that the public principally relied on newspapers and television stations for their news. On this basis they would give little weight to other media sources. Justice then goes on to compare the local market shares of the newspaper and television station combinations with Clayton Act Section 7 merger guidelines. Simply put, in an oligopolistic situation the acquisition of even small

[12] 21 F.C.C. 2d 570 (1970); 23 F.C.C. 2d 316 (1970); 27 F.C.C. 2d 486 (1971); 29 F.C.C. 2d 480 (1970); 35 F.C.C. 2d 875 (1972).
[13] 16 F.C.C. 2d 882 (1969); 20 F.C.C. 2d 903 (1969); 40 F.C.C. 2d 775 (1973).
[14] Separately from the anti-trust based market concepts is the alternative suggestion from Justice to divest wherever the Grade B television signal encompasses the SMSA of the newspaper community.

shares of the market can conflict with these guidelines. However, as a number of parties point out, the prohibition in Section 7 applies to acquisitions, not to internal growth, as was the case with the creation of most newspaper-television combinations. Instead, these parties point out that the Sherman Act prohibitions on monopolization apply. In such instances, Section 2 of the Act requires a showing of action of the entity in question to set prices or otherwise restrict competition. They contend that no showing has been made that establishes anything resembling such economic power. According to these parties, even the Rosse, Owen, Grey study[15] purporting to show higher rates being charged by newspaper-owned television stations, to which the Department of Justice refers, is subject to many doubts, so that even the Department does not vouch for its methodology or conclusions. The conclusion that a 15% price increase differential is available to newspaper-owned TV stations is directly refuted in two industry studies which point out that the other study did not take audience figures into account in relation to prices charged. Our own examination does not substantiate the findings of the Rosse study.

40. It is clear that by any standard, market differences do exist, and that the extent of economic power, whether exercised or not, varies. When this proceeding began, there were 19 instances (now fewer) in which the owner of the only local daily newspaper also was connected to the only television station licensed to the community. From a concentration point of view, these would seem to present the most severe cases, but even in these instances, the industry did not agree that action by this agency was appropriate. They say also that from a diversity point of view even in these communities there is a plethora of media voices originating in or entering the market. While the overall industry view is that there is no need for any divestiture, at least one broadcast filing (that of the Post Company, of Idaho Falls, Idaho) seems to indicate that presumptively in these cases of one-owner markets, there is a condition of inadequate diversity. The Post Company prefers a rule to an *ad hoc* approach or if that fails to be adopted, a policy statement. Either, it argues, would be preferable in terms of industry stability because it would give advance notice, simplify administration and reduce uncertainty.

41. *Audience Share of the Market.* The National Citizens Committee for Broadcasting ("NCCB") would follow the approach of the de Jonckheere study[16] on market share and give appropriate market-share weights on a scale of 100, divided 40 to daily newspaper, 40 to television stations, and 20 to radio stations. Each entity would be given its circulation share (or be evenly divided for radio stations) and the market share thus be derived. Although NCCB would not include weekly newspapers, it says if they are to be included, they should be given 1/7 the weight of a daily newspaper. To the figures on market share thus obtained NCCB would apply both *per se* and *prima facie* limits. If a single owner had a 30% share it would be considered *per se* objectionable; 20% to 30% would constitute a *prima*

[15] *Empirical Results on the Price Effects of Joint Ownership in the Mass Media* (1970). See para. 96, *infra*, and Appendix B, p. 1.
[16] *Monopoly in the Media*, by Terrall M. de Jonckheere. See Appendix B, p. 2.

facie showing of concentration that a party could offer to rebut. NCCB would have the Commission ignore a less than 20% market share absent an allegation of abuse. According to NCCB, its plan avoids the pitfalls of a mandatory across-the-board ban which by its nature could not take into account differences in individual markets. Likewise, it sees this approach as being preferable to the haphazard methods involved in a totally *ad hoc* procedure.

42. *The Place of Anti-Trust Considerations in Commission Determinations.* No one has argued that anti-trust considerations are totally inapplicable to the media, rather the dispute centers on the importance of anti-trust considerations to the resolution of the public interest issues now before the Commission. The Department of Justice points to its own responsibility for the enforcement of the anti-trust laws and for the preservation and enhancement of commercial competition as the basis for its filing here. Its view is that the Commission should act itself based on the anti-trust arguments which have been made. In particular, Justice says that there is too much concentration of ownership which in turn has caused a curtailment of the options open to advertisers. Throughout, the Justice filings proceed from economic premises having principally to do with economic competition for advertising. It is not that diversity of viewpoint is not dealt with; it is. Rather, it is a question of the orientation, of views expressed in competitive terms, views it feels the Commission is obliged to consider.

NEWSPAPER OWNERSHIP—DIVERSITY OF PROGRAM AND SERVICE VIEWPOINTS

43. The preceding discussion has focused on the economic significance of combinations. The other side is the impact on the dissemination of ideas in a democratic society if there is a combination of media holdings held by a single entity. At what point, if any, is there a lack of diversity of viewpoints and programming or if such diversity at some level exists does that end the need to consider the size or market share of the entity in question? These are the kinds of questions to consider.

44. Opponents of the proposal have argued that the proposal rests on the false premises that current diversity is inadequate and that 51 voices are necessarily better than 50. However, they assert, if the forced transfer of a station to the 51st voice results in the station's news operation's being reduced to "rip and read", the addition of the 51st voice would not have been beneficial.

45. *Do They Speak With One Voice.* Opponents contend that cross ownership of newspapers and broadcast stations does not mean that both entities speak with the same voice. Most of the parties state that their broadcast stations and newspapers have separate management, facilities, and staff, including news and advertising staffs (which compete with each other for advertising), and do not have joint advertising rates. Some even claim that because they have separate editorial boards they present editorials in one outlet which are opposed in the other. We are told that there are other built-in protections against commonly owned newspapers and station's offering the same viewpoint

and information. These parties point to the professionalism in journalism and the development of industry practices and codes of ethics which transcends employee-employer loyalties and result in highly independent staffs operating even common owned media. Also, the technology which requires specialized and separate management teams for various media holdings is said to limit the influence of the common owner. Finally, we are assured, there is protection because of existing diversity, so that in major markets it would not be possible to control the informational output of the communications media or to prevent a significant point of view from reaching the public. These parties assert that if abuses of this nature were occurring, there would be outcries from the public and other local competitive media. They believe that the absence of such complaints is the most telling argument against the need for the proposed rules and that in smaller markets economic considerations may inhibit the financial separation of different media.

46. Supporters, on the other hand, argue that a so-called separation cannot be considered as equivalent to separate ownership. They fear conscious or unconscious decision making protective of the other entity and even more the possible inhibition in the operation of each without regard to the consequences on the other. They urge separate ownership as the only way to have truly diverse and antagonistic voices.

47. *Adequacy of Current Diversity.* Opponents point out that there has been a long term trend of increasing diversity of media ownership with many more broadcast stations operating now than formerly was the case. According to NAB, in the top 100 markets (based on size of SMSA's) the total number of media outlets has increased markedly. From 1922 to 1967 the number of broadcast outlets increased 968%. While the number of daily newspapers has remained about constant, they say that there has been considerable growth in circulation, particularly in smaller cities. This leads these parties to conclude that in most major markets the addition of one more media owner would have a minimal effect on the amount of diversity in that market as there will continue to be a large number of media owners even if the proposed rules are not adopted.

48. More specifically, many parties referred to the Seiden study submitted by NAB to show that there is ample diversity in their own markets. The Seiden study listed all media available in each market in various categories, including those originating within and outside the market. Unlike the premises under which this study was done, the Justice Department would only include local television and newspapers in evaluating diversity since in its view these are the only effective competitors for local advertising. Weekly newspapers and other periodicals as well as broadcast signals originating outside the market on this basis should therefore not be counted. Opponents of the proposed rule and of the Justice viewpoint recommend that national media be considered in addition to local media because they reach substantial numbers of people to provide diverse information sources. Further, they urge that the fact that the public favored one medium or one newspaper or broadcast outlet rather than another should not be taken as indicating a lessening of the diversity of available media.

They thought it should be irrelevant for the purpose of the Commission's proposal that the circulation bases differed so markedly.

49. At the time the proceeding began there were ninety-four (94) TV stations which were affiliated with local newspapers. The Seiden study purported to show that there is abundant diversity in these communities as well as elsewhere—that there is abundant diversity in every TV market. In New York City, we were told, there were 610 media with 434 owners. Even in Zanesville, Ohio, the then most concentrated market, there were 49 media with 39 owners. Of these, four media were considered local, and were held by two owners. In Glendive, Montana, the smallest market, there were 36 media with 30 owners. Of these, five media with four owners were local. The average for the top 50 markets was 317 media, owned by 170 different groups. Of these, 139 originated in the market and were held by 111 different owners.

50. The American Newspaper Publishers Association ("ANPA") says that the number of newspaper-owned TV stations has decreased since 1948, when 48% were owned by newspapers, to 14% in 1969, and there has been an absolute as well as proportional decrease in newspaper-owned stations since 1955. The NAB says that newspaper ownership of all broadcast outlets is less than 7%. The Udell study submitted by the ANPA showed that in 78 markets with newspaper owned TV stations, 143 TV stations commenced operation after the newspaper owned station, and 131 of these new operations were started by non-newspaper interests. This to them shows that newspaper owned TV stations have not discouraged others from entering the field. Udell found that although often the newspaper-owned TV station dominated its market, there were many cases in which it was not the dominant station.

51. Opponents assure us that the Fairness Doctrine, Section 315 of the Communications Act, and the developing body of law falling under the category of "access to media" ensure that stations will not present only one viewpoint. Moreover, we should take into account, they insist, the fact that the public's increased awareness of its stake in the free flow of information has caused an increase in the filing of petitions to protect that interest and this too helps to ensure diversity of viewpoints. They conclude that not only do we have enough diversity, in fact modern technology has brought society to the point of information overkill, where the individual is paralyzed by the sheer volume of information and available choices.

52. Supporters of Commission action do not accept any such view. Instead they see a growing diminution in major media choices particularly newspapers and they assert that the Seiden approach uses numbers to obscure the situation by the faulty means of equating media regardless of subject or circulation.

NEWSPAPER OWNERSHIP—SPECIFIC ARGUMENTS

53. *The Commission Should Proceed on an Ad Hoc Basis Rather Than By Rule Making.* The parties who oppose adoption of the rules contend that as to newspaper ownership the Commission should continue to use the *ad hoc* approach as it has in the past rather than proceed on a rule making basis. The Commission, it is said, has greater flexibility in attacking situations where specific abuse may occur by the *ad hoc* approach rather than by seeking an across-the-board solution by means of a rule. They insist that both the Commission and the Department of Justice have the tools and the authority to reach any situations with the potential for abuse so that wholesale divestiture without regard to the facts of each particular situation is simply not warranted. Each market, they say, has its own characteristics and each differs from every other market; a rule would not take these differences into account nor would it make provision for those individual situations where there is no question that the cross-ownership has resulted in superior service. Opponents further argue that the proposed rules reflect only one component of the public interest, i.e., diversity, and ignore other important elements such as the costs and detrimental effects of forced separation.

54. The rule making approach, opponents charge, represents a blunderbuss policy in place of precise and carefully fashioned judgments based on facts in each individual situation. They assert that if the Commission were to continue to attack the problem on a case-by-case basis, it could root out those situations which threaten injury to the public interest without itself inflicting injury on the public interest by requiring the divestiture of a cross-owned station where there has not been so much as a suggestion of impropriety. The Commission should, it is asserted, consider, in each individual situation, such factors as the extent of interdependence of the cross-owned media in a particular market; whether the market is metropolitan, regional or local; the prospects for financial independence; and the extent of the possible disruption of service to the community. Factors such as these, they say, do not lend themselves to consolidation in a rule. Finally, the opponents argue that, in order to warrant an industry-wide approach such as that represented by a rule making proceeding, the Commission must, at the very least, indicate that the problem which it seeks to attack is so widespread as to require such an approach. This they charge the Commission has not done.

55. Supporters urge us to act through rule making rather than *ad hoc* procedures as in keeping with our stated intentions in this regard and with other approaches taken in the area of concentration. Moreover, we are told, such an *ad hoc* procedure could introduce uncertainty to the detriment of the industry and public alike.

56. *Divestiture Would Not Necessarily Accomplish the Desired Ends, and Might Produce Harmful Results.* Opponents have asserted that if any divestiture were to be accomplished through the trading of broadcast properties between newspaper publishers, there would be no overall decrease in concentration of control nor any increase in the total number of available voices. Thus, they insist, no real benefit would be brought about by divestiture, but real detriment would. An economic study offers the view that it is easier to operate a broadcast station within your home market, so that a station outside the home market would bring a lesser price. Further, a publisher accustomed to operating a station at home might be unwilling to undertake a similar opera-

tion in some other city, with the attendant increases in costs and additional control and managerial problems.

57. The economic studies further contend that by the very fact that many stations would be put on the market, the value of those stations would be reduced. However, in spite of this reduction of the price of stations, it is asserted that in many instances the price will remain too high to service the debt capital necessary to purchase a station. Under these circumstances, they expect that many of the available stations would be purchased by multiple owners or nationwide conglomerates, with the result that the divestiture requirement would not increase the overall diversity of voices, and it may in fact decrease the number of available voices. Supporters point out that as to the community in question, they nonetheless would represent a new choice.

58. Some parties assert that there is a correlation between newspaper ownership and high quality news and public affairs programming. Others contend that economies of scale can be achieved with cooperative news gathering facilities. In both instances, we are told, divestiture would result in a loss of these benefits, perhaps causing a reduction in the quality of program offerings, because owners could no longer rely on these resources. However, on the other side it has been alleged that there is no correspondence between the quality of news carried on a television station and that contained in a commonly owned newspaper. In addition, proponents of the rule contend that there has been no showing that economies of scale exist or if they do exist, they charge that they are products of an oligopolistic situation which has resulted in higher advertising prices on jointly owned facilities. Post-Newsweek asserts in its study that it is not common ownership but other factors [17] which account for higher advertising rates, and various parties point out the study showing higher television rates failed to take size of audience into account.

59. *The Proposed Rule Assumes a Similarity in Cross-Ownership Situations.* According to various opponents the approach we contemplate fails to recognize the differences between UHF and VHF, between radio and television, and between markets of different sizes, subordinates the public interest to administrative convenience and will have lasting deleterious effects on the industry. Thus they say we should observe these distinctions and recognize that a rule requiring divestiture for radio-newspaper combinations is not necessary because in most large markets an individual radio station does not have significant market power. However, it is said, in smaller markets (below the top 100) individual radio stations may be significant competitive factors. Therefore, we are urged to review radio-newspaper combinations in markets below the top 100 on a case-by-case basis and require divestiture where necessary. Others urge the adoption of specific rules for smaller markets.

60. Licensees in smaller markets generally believe the Commission's concern should be with larger markets and exemptions should be provided for smaller markets. They point to the smaller size of these

[17] The four are: being the first station on air in market, being a CBS affiliate, operating on a low-band VHF channel or lowest channel in market, and having the highest audience share.

combinations, arguing that as a result there is less cause for concern about detrimental impact and more about disruption. However, licensees in large markets believe the serious problem exists only in those markets where there is only one daily newspaper and only one television station. These parties place their stress on the number of direct competitors in the market.

61. *Unique Situations.* Several parties argue that "unique" situations in particular markets require that the proposed rules not be applied in those cases. For example, the licensee of a Class A FM station in Santa Monica, California, and publisher of an evening newspaper in Santa Monica argues that his holdings constitute a minute fraction of the total mass media in the market. Santa Monica, a suburb of Los Angeles, is said to be saturated with broadcast service, receiving primary signals from 10 AM, numerous FM and 11 commercial and one educational television stations. Similar arguments have been made that other communities are overshadowed by nearby cities of much greater size, and we have been told that in such communities, UHF and FM stations might not have survived without newspaper ownership.

62. *Jointly Owned Broadcast Stations and Newspapers in the Same Market Can Give Better Service.* One frequent argument is that joint ownership of newspapers and broadcast stations made possible the early development of FM and TV service even though these pioneering stations often had to be operated at a loss. This leads these opponents to conclude that had the resources of newspapers not been available, the public would have been without such service for a long period of time.

63. In addition to the historical argument, these parties offer arguments supporting the view that benefits would continue to accrue. According to the exponents of this view the public would lose more than it would gain if those of the journalistic tradition are excluded from broadcasting. They argue that newspaper owners, coming from a tradition of journalism rather than entertainment, have set high standards of emphasis upon informative broadcasting with extensive news staffs and upon dedication to meeting community needs and advancing community projects. In fact, former Chairman Newton N. Minow has suggested that the public interest might better be served if, contrary to the thrust of our proposal, more newspapers were given the opportunity to operate TV outlets in their communities. He also suggested that the tradition of professional journalism offered by the newspapers greatly enhanced their ability to offer programs in the public interest.

64. The argument has been made that integrating broadcast and newspaper operations enables the licensee to provide service in the public interest which could not be provided if the operations were conducted independently and under separate ownership. Combined ownership is said to permit experimentation, innovation, minority programming, more effective dissemination of news and public information, independence from advertisers, lower advertising costs, financial stability, and otherwise contributes to diversity. They argue that because of the combination, many efficiencies and economies of operation can be effectuated, such as economies in buying and maintaining equip-

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ment, the joint use of buildings and office space, the common staff of program, technical and administrative personnel, etc.

65. Many have asserted that newspaper-owned broadcast licensees have a record of public service which is among the highest in broadcasting. Their contributions to the public interest constitutes in the view of these parties a tangible benefit which cannot be sacrificed for the theoretical benefits which the Commission has assumed will result from the proposed divestiture. They assert that newspapers owning broadcast stations in the same community are doubly conscious of their responsibilities to the public and have a greater knowledge of and immersion in the community's needs and problems than do non-newspaper owners. Local newspapers are said to often be locally owned by people who have long been directly involved in the community and in community service, particularly as an outlet for public expression. They insist that newspaper ownership of broadcast stations is more stable than that of other entities and that newspaper owners do not traffic. Continuity of ownership of broadcast stations we are assured would avoid the weaknesses inherent in stations which change hands frequently. We are told that the long term owner is continuously aware of community problems and by so doing can maintain a long range effort to deal with those problems.

66. Conversely, the argument is made that the existing owner takes the community for granted, and assumes too much in connection with ascertaining community problems. A newcomer, the view goes, would gain fresh insights since it would have to ascertain without presumption based on past history. Thus, the argument goes, service could actually improve.

67. In connection with radio stations in particular, opponents of the proposal see real benefits in newspaper ownership. They say that there are many situations where a radio station could only survive economically because of the support provided by a co-owned newspaper in the same market. If this were precluded, they feel the community would have fewer voices. They also assert that such a combination could provide higher quality programming than could normally be expected from singly owned stations. Moreover, the programming of newspaper owned stations is said to function as a counter-balance to national network dominance.

68. *Broadcast Media and Newspapers Are Not Comparable.* Although opponents of the current proposal acknowledge that newspapers and TV are the public's primary source of news, they contend that there is a radical difference between them, both in method and scope. They are seen as complementary, not competing, sources of news. In their view the Commission's statement that newspaper ownership of a co-located TV station directly parallels joint ownership of two TV stations in the same community, ignores many salient differences. For example: (a) the broadcast media bring the public only the headlines whereas newspapers provide the details and background; (b) the broadcast media devote no more than 10% to 12% of their time to news whereas newspapers devote 100% of their non-advertising space to journalistic function; (c) broadcasting is basically an entertainment medium whereas a newspaper is primarily a

news medium; (d) a newspaper is a recorder of events whereas the broadcast media are not; (e) newspapers provide a permanent record for future reference whereas the broadcast media do not; (f) the types of advertising and the products advertised through the two media differ; (g) the two media do not necessarily encompass the same market; (h) the persons who use TV as their primary source of communication do not necessarily subscribe to newspapers; and (i) the broadcast media are inherently incapable of providing on a day-to-day basis in-depth local reporting whereas a newspaper has such capability. Pointing to the Commission's *Further Notice* in this proceeding (at para. 29), where it was indicated that studies showed that persons replying most heavily upon newspapers as a source of information are those identified as leaders or opinion molders, the opponents state that the joint ownership of a newspaper or TV station is likely to make no difference to these people since the nature of the newspaper analysis of a news event varies so greatly from the most abbreviated form of news which appears on TV. Further, we are assured, these persons are unlikely to rely on a single source of information for their news.

69. The point is also made that the two media function quite differently in the manner in which they cover the news, thus reflecting not only the innate differences between the media but differences in coverage as well. These factors are said to ensure that the public receives the benefits of separate news sources, which do, in fact, even if they are commonly owned, offer divergent viewpoints and approaches to issues of public concern. Editorial practice we are told, is a far more significant facet of diversity than is ownership. Accordingly, they would reject what they see as the Commission's assumption that cross-ownership causes newspapers to speak and write with one voice. Not all parties, of course, find these distinctions particularly important as they continue to see the two as parallel entities.

70. *The Rules Would be Contrary to Past Policies and Pronouncements That Led to the Development of the Present Broadcast Services and are Inequitable to Those Who Acted in Reliance on Those Policies.* The various parties presenting this argument submit that the present structure of the broadcast industry has been created by the Commission which has licensed each station in question, at times after a comparative hearing, and repeatedly renewed those licenses after finding that the renewal would be in the public interest, convenience and necessity. These parties contend that it would be a breach of faith for the Commission to now reverse these prior decisions and ban the cross ownership which was previously approved.[18]

71. They assert that diversity is one of several fundamental criteria considered by the Commission in granting broadcast licenses, and the Commission has considered these other criteria, including local ownership, integration of ownership and management and experience, in finding that a grant of a broadcast license to a newspaper or existing broadcast licensee would serve the public interest. Instances of such

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[18] In part, this is in response to the Commission's statement in the *First Report and Order* (in particular in para. 22) that changed circumstances necessitated that a different view now be taken regarding such combinations.

actions they point to include the licensing of the AM and FM stations in Elyria, Ohio, to Elyria-Lorain Broadcasting Co., the publisher of the local newspaper; the assignment of KOA–AM–FM and TV, Denver, Colorado, to a single party; and the grant of the application of Paducah Newspapers, Inc. for WPSD–TV in Paducah, Kentucky. They also mention *Orlando Daily Newspaper, Inc.*, 11 F.C.C. 760 (1946) and the *Policy Statement on Newspaper Ownership*, 9 R.R. 702 (1944). Based on their reading of these precedents the current proposal would without valid basis, they aver, summarily reverse the ongoing practice of years standing.

72. On the other hand, supporters of Commission action assert that while the economic and technical considerations of the 1940's and 1950's justified a more lenient Commission policy toward cross ownership, those prior considerations are no longer operative. Under present conditions, they think it is unlikely that the number of newspapers and broadcast stations will significantly increase in the foreseeable future, and the Commission is therefore justified in taking a more restrictive approach (see footnote 18).

73. *Great and Irreversible Damage Would Result To Media and To Individual Stations and Newspapers.* Opponents insist that no matter how economically strong, no industry can absorb unlimited burdens. At some point they say, there is a limit, which once exceeded, leads to a collapse of that industry. They assert that quite a number of burdens have been imposed on broadcasters so that the point is nearing when the ability of the industry to respond may be impaired. As examples of such burdens they mention a series of recent Commission actions such as increased fees, new renewal procedures and prime-time access as well as the more frequent occurrence of petitions to deny and increased costs. The point is that whatever the source, whatever the legitimacy of the justification, the unavoidable impact on the broadcaster is a burden that can lead to a driving out of needed capital as well as a pushing away of fresh talent and creativity. Opponents argue that too much of a good thing can be fatal and that the price paid would be in lessened diversity, which is the opposite of the hoped-for result. Supporters assert that we should question these dire predictions. These, for the most part, are seen as greatly exaggerated. Such validity as is accepted is said to exist in only some individual circumstances.

74. The proposed rules would also have adverse economic consequences for newspapers we are advised by opponents. Divestiture could impair the revenues of newspapers and result in the decline in their value. Moreover, they contend that to the extent owners decide to keep their broadcast stations and divest their newspapers, there would be a decline in the value of newspapers with potential for forcing marginal operations out of business. They also suggest that the proposed rules would threaten the balance reached by the Congress in the Newspaper Preservation Act between the public interest in competition and the public interest in continued financial viability of newspapers and their editorial independence. Finally, they express a concern that adopting rules might limit the ability of publishers to enter into electronic newspaper distribution in the future. They feel that for newspapers to remain viable it may be necessary for them to be able to

use something other than the present modes of newspaper production and distribution which may become too slow or expensive.

75. Divestiture, opponents assert, also raises questions concerning the continued viability of special format daily newspapers. For example, the licensee of an AM and FM station in New York City also publishes a daily Yiddish-language newspaper. The paper operates with an annual deficit which in part is offset by an annual profit from the radio stations. The licensee contends that funds from the radio stations are necessary to provide for continued publication of the paper.

76. Finally, a particular danger is said to be involved in divestiture because the results would be permanent and irreversible. They assert that the genius of the administrative process is its ability to be flexible and to consider matters in the light of changed circumstances, attributes which could not be brought to bear for there is no way to return to the *status quo ante* if the results are not what were intended. They argue that since there is no way to return the outlets to their original holders if the action proves improvident, the risk is so great that any cause for concern is sufficient to establish that the step should not be taken unless there is clear proof of harm from the existing circumstances.

The Rules Would Discourage Risk Capital in Broadcasting and Impose High Costs of Operation Contrary to the Public Interest

77. This argument, made by several broadcast interests, is that divestiture would result in a drastic alteration of the industry structure and breed economic instability. This they say would come about because the new owners of divested stations would face significant economic burdens, principally as a result of paying high prices for broadcast properties that have appreciated greatly over the years. Because of high interest rates, the cost of debt service will reduce the working capital and profit accumulation which would otherwise be available for programming including news and public affairs. Beyond these economic factors, various other burdens are mentioned as being placed on broadcasters, and the fear is expressed that this could be a last straw. The continuing infusion of capital, energy, and creativity needed to properly nourish the industry in their view may be stymied because of the economic burdens, the governmental interventions and restrictions imposed. The NAB sees this proceeding as one in which adoption of the rules would give just such a negative signal to those now involved or who would become involved in broadcasting: results clearly detrimental to the public interest. Supporters say they cannot agree that an industry they see as characterized by extraordinarily high profits would somehow become anathema to investors.

The Proposed Rule Amounts to the Virtual Abandonment of the Commission's Policy Favoring Local Ownership

78. Opponents charge that the divestiture provision of the rule would frustrate the Commission's policy favoring local ownership which has long been considered conducive to programming responsive to local needs and interests. This they say can be seen in the Commission prediction that many licensees will simply trade stations with

other licensees, thereby achieving divestiture without significant upheaval in the identity of the media ownership. They argue that this trading of broadcast properties would result in absentee ownership. However they do not think such ownership is desirable, particularly where a broadcast station is traded away from a newspaper with local ownership and strong community ties. Rather, they believe that the strong affiliation between a newspaper and its community often results in programming on a commonly owned television station which is particularly responsive to the needs and interests of the community. They think an absentee owner, with less contact with the community might be less concerned with the public interest and more concerned with the balance sheet, and the divestiture may result in the fragmentation of professional staffs which have been built up over the years to provide the best possible service to the public. This leads them to conclude that the absentee ownership resulting from divestiture would therefore result in a loss of service to the public.

79. Opponents have rejected suggestions that the first opportunity to purchase a station be given to a local group or that more than one potential purchaser be submitted to the Commission as unworkable and contrary to Section 310(b) of the Communications Act. They assert that such courses of action would interfere with existing interests and equities and jeopardize existing service. Proponents, on the other hand, asserted that any resulting reduction in local ownership should not be used to justify and maintain a monopoly situation, and they urge the Commission to proceed with divestiture. In their view, local ownership as a goal necessarily pales in comparison with providing needed diversity.

Newspaper Ownership—Miscellaneous Arguments

80. Parties opposing the Commission's proposal have offered several procedural or jurisdictional objections. Several have taken the view that the proposal represents such a fundamental policy shift that the Commission should not act without Congressional mandate. It was their view that this subject should be considered at Congressional hearings from which policy guidelines would emerge. The Commission is urged not to proceed without such guidance from the Congress.

81. Two other procedural objections to implementation of the proposed rules have been interposed, both relying on the view that a hearing would be required beforehand. One asserted that the Commission should not proceed without holding oral argument on the proposal [19] and the other insisted that any affected party would be entitled to a full evidentiary hearing before it could be required to divest.

82. Progressive Broadcasting Corporation is licensee of Stations WHOM–AM and FM and is commonly owned with a daily newspaper. It wonders if the rule would apply to it and asserts that if it would special recognition is required of its unusual situation. It argues that a rule should not apply to it since the radio stations are essentially Spanish language and the daily newspaper, even if it is circulated generally, reaches only an audience that reads Italian.

[19] This, of course, has taken place.

Moreover, it asserts that the Spanish speaking audience for the stations does not much overlap with the readers of *Il Progresso Italo-Americano*. Aside from the divergence in audience, Progressive contends that neither has the broad general appeal and impact that seemed to be the cause of the Commission's concern. For itself and others similarly situated Progressive asks that any rule which might be adopted not be considered applicable to such situations.

83. The Illini Publishing Company, a not-for-profit corporation at the University of Illinois, owns the daily student newspaper, an FM station, and the yearbook. It stated that it would not comment on the desirability of cross-ownership for commercial properties but that cross-ownership in its situation is a guarantee of financial and therefore editorial independence from the University administration, the student government, or any other potential pressure group. It has never accepted student fees but has depended on the sale of advertising and circulation, and in various years one or the other of the three media was supported by its fellows.

84. The Forward Association publisher of *The Jewish Daily Forward* and licensee of New York City Stations WEVD–AM and FM says it is not clear whether the rule would apply to foreign language newspapers. The Association says it should not, but if it did, the Commission should hold an evidentiary hearing in each case to determine whether divestiture should be required.

85. The Oklahoma Press Association in opposing the proposal notes that some universities have both newspapers and television stations. While educational broadcast stations are exempted from the duopoly rules, it points out that it is not clear where the proposal leaves Notre Dame University and the University of Missouri, both of which operate *commercial* television stations (WNDU–TV and KOMU–TV, respectively).

86. Finally, several parties wonder how many papers per week a newspaper must publish to be defined as a daily? Is a paper that publishes three days a week a weekly and one that publishes four days a week a daily? They also suggest that if the proposed rule is adopted, it could be circumvented by publishing six different weekly publications, each on a separate day.

Divestiture Would Constitute an Unprecedented Governmental Intrusion

87. The NAB and others insist that there is no precedent for the action proposed here. Never before in the history of the FCC or any other governmental agency, they assert, has a proposal of this magnitude ever been implemented. In strictly legal terms, the charge is that no agency has ever so proceeded without basing its action on a proven law violation and in furtherance of an express statutory authorization. Here neither is said to be present and this makes it all too clear how drastic and extreme the proposal really is. The closest example, that of the 1943 FCC action affecting radio duopoly cannot, it is said, be considered analogous. In that situation, we are told, relatively few stations were affected and the economic impact was notably smaller than that which would be anticipated here.

Divestiture Would Have a "Chilling" Effect and Inhibit Free Speech and Press

88. The charge is made by the NAB that already extensive regulation exists and unwarranted extension of such regulation could only have harmful results. Inevitably, they feel, a fear would be created that governmental action could be invoked as a means of expressing displeasure at a course of conduct, not because it is unlawful but because it is contrary to governmental preference. Even if the current proposal in itself did not bring the weight of government to bear in such a manner, they believe that the fear would be created that it could happen in the future. The net effect they foresee would be a restriction on free speech, a curtailment of creative journalism, affecting newspapers as well as stations. Thus, the NAB states, in a democracy, it is the power of the government, not that of the press that is to be feared. Especially in the current political climate, the action here proposed is bound to be interpreted as a governmental assault on the free press, it is argued.

89. The lesson of history in this regard is said to be clear: there is no such thing as compulsory freedom. Just so, there can be no compulsory diversity. The greatness of this country's press, print and broadcast, we are told is the product of the lack of governmental intrusion. It is its freedom of operation that has and will continue to offer a continuation of the situation in which American diversity exceeds that of any country. The Commission is urged not to yield to temptation by following the restriction paths traveled by other countries. Rather, the Commission should follow the path of freedom and non-intervention. Supporters assert that the structured approach involved here is a lesser danger in free speech terms than Commission intervention in programming as could happen in fairness cases.

If Any Rule Is Adopted, Existing Interests Should Be Grandfathered

90. This view which is in direct conflict with the divestiture proposal was expressed by Duhamel Broadcasting Enterprises, Inc., and Paducah Newspapers, Inc. Divestiture, Paducah says, would be disruptive, counter-productive, unfair, oppressive, etc., and should not be ordered in the absence of a showing of specific harm. Although cast somewhat differently, the point is essentially the same as that presented by many other parties and which has been discussed previously.

Proposal Too Rigid

91. Several points are subsumed under this heading. One concerns the view expressed by several parties that an exemption for UHF stations is an economic necessity. At most, they argue, these situations should be considered on a case-by-case basis. Another party takes the view that in certain markets, a weekly newspaper can be the more powerful medium, not the daily, and the rule would give no recognition to such a situation.

The Commission Should Adopt Specific Rules To Deal With Potential Abuses

92. Several parties suggest that if the Commission can identify evils which could occur in cross-ownership situations, such as preferential advertising rates for purchase of both newspaper space and broadcast commercial time, it should regulate such practices by specific rules. The Commission's response to the payola scandals—sponsorship identification requirements of Section 73.119 and 73.654—is said to be a good example of selective rule making.

93. According to various parties, the objective of achieving maximum diversification of media ownership is not in and of itself determinative of where the public interest lies. This is said to be evidenced by the numerous cases in which the Commission has granted, in comparative proceedings, applications resulting in a greater concentration of media control. They take the view that the Commission's proposal would establish an irrebuttable presumption that any legally qualified applicant unconnected with a newspaper will serve the public better than a station owned by a company which also publishes a local newspaper. A complete prohibition of common ownership is said to risk the exclusion of the best available interested party to the community which in some cases might lead to the exclusion of the only applicant. In sum, the view is that the single most critical factor in governing the extent to which the public interest will be served is the licensee's motivation and interest in serving the community. According to many affected parties the common owner of co-located newspaper and broadcast facilities is often the only one in the community so motivated. On this basis, they assert that the proposed rules would work to the detriment of the public, and thus they urge rejection of such a rule. Supporters see things quite differently, questioning whether such a grant could really add anything worth the cost of possibly forever excluding another party which might step forward in the future.

MAJOR STUDIES SUBMITTED

94. A number of studies have been submitted, including some by parties not associated with the newspaper or broadcast industries. The studies cover four major topics. Some studies treat more than one topic, but are listed only once in the summary which follows. A list of these studies is contained in Appendix B.

95. *Economic Consequences of Divestiture.* Both the Frazier, Gross study and the First National City Bank study indicate that combination owners will most likely transfer their TV stations rather than their newspapers. First National is extremely pessimistic about the financial outcome for sellers of TV stations, under divestiture market conditions. Frazier's judgment is that TV stations will sell at 10% to 20% below true value if all affected stations were to be divested. Our own evaluation is that the concern may be exaggerated.

96. *Effect of Common Ownership on Competition.* No claims were made that newspaper-television station owners have committed any specific non-competitive acts as such, but Rosse et al. attempt to show that, all other things held constant, newspaper-owned TV stations charge their advertisers higher prices than other TV stations, and that this is probably due to the monopoly effect. Their calculations show that newspaper-owned TV stations charge about 15% higher rates. The NAB and ANPA statisticians see a conceptual error in Rosse's

model—audience was omitted as one explanatory variable, and when the error was corrected, the difference in prices between newspaper-owned TV stations and others was not statistically significant. The Post-Newsweek study also covered this point. The Commission's own examination of the point fails to show an effect on rates attributable to newspaper ownership. Levin uses past TV station sales prices as a measure of whether newspapers have been subsidizing their owned TV stations. He finds they have not.

97. *Effect of Common Ownership on Station Performance.* Both the Student Group and Levin did empirical analyses to determine if newspaper-owned TV stations differ from other TV stations in the quantities of news, public affairs, local programming, etc., they present, and Levin also studied possible differences in diversity. Levin's findings appear to be inconclusive. The Student Group finds that there is no significant difference in the performance, between TV stations owned by local newspapers and other TV stations. Although the NAB findings use different methodology with the Student Group data, the results are essentially the same—no significant differences. A Commission staff study on this topic is attached as Appendix C. When the earlier submissions were prepared, the Annual Programming Reports for television stations had not yet become available. The Commission's study is the first to use this data. The American Institute conducted a study of public attitudes, behavior and knowledge of current events in two similar cities, to determine if media monopoly (Zanesville, Ohio) results in a less informed public than competitive media (York, Pennsylvania). The York population sample was found to be significantly more knowledgeable on current events, and this was attributed to the fact that the only newspaper, TV station and AM/FM radio station in Zanesville were then controlled by a single owner. J. Anderson attempts to discover whether the informational content of the news broadcasts and daily papers of co-owned media show a greater correspondence than do media separately owned. He finds that TV-newspaper combinations and radio-newspaper combinations do not result in a monolithic presentation of information, in the many sample cities studied. Cox Broadcasting's two studies result in similar findings for two specific markets where they own newspapers and broadcast stations—Atlanta and Dayton.

98. *Multiplicity and Diversity of the Media.* Sterling shows that the number and proportion of newspaper-owned broadcast stations has been on the decline since 1950. Udell says that newspaper-owned TV stations have declined from 29% (of all TV stations) in 1955 to 14% in 1969. He also points out that there has been growth in the TV industry in spite of newspaper ownership in many markets. The ANPA staff study presents tabulations that confirm the downward trend and they also show that the total media voices (including magazines and other publications) is extremely high in most markets (e.g. 660 in Washington, D.C.). Seiden's study, counting all the media voices in the ADI counties of each market, also presents high figures (e.g. 98 in San Diego; 610 in New York City). Wilcox in his submission seems to suggest that newspapers and broadcasters are not instrumental in shaping public opinion, and that with the enormous volume and contradictory viewpoints presented, people are overwhelmed and reject everything. The Commission does not believe that "counts" as such add much to our knowledge as they fail to consider the particular characteristics that assume considerable significance in many situations.

CONCLUSIONS

99. *Introduction.* It has become clear in reviewing the record of this proceeding that additional public interest considerations need to be applied in judging the public interest consequences of present as distinguished from future common ownership interests in co-located newspapers and stations. Put otherwise, the idea of divestiture, implicit in retrospective rules, requires a demonstration of more than just theory or a resting on narrowly drawn balances. Rather, we must consider the impact that divestiture would have, taking into account factors not present in connection with prospective rules, matters which must be examined if fairness is to be achieved. Before we proceed with our discussion of these two aspects separately, there are a number of general observations to be made about the public policy on which Commission action is based. The multiple ownership rules rest on two foundations: the twin goals of diversity of viewpoints and economic competition. The Commission has a responsibility to consider various aspects of the qualifications of licensees or applicants, among them the question of multiple ownership. In so doing, the Commission acts in individual cases or through rule making. Early in its history, the Commission acted to adopt rules to end common ownership of stations in the same service serving substantially the same area. Needless to say, such commonly owned stations could neither be true competitors nor could they offer true diversity. Since then the multiple ownership rules have been extended in a number of respects to better serve one or both of the above goals. As to competition in particular, the national public policy (expressed in anti-trust laws and elsewhere) in favor of competition and against actions which would curtail it, finds a reflection in the actions of the Commission. Sometimes, this policy will yield, however, to the even higher goals of diversity and the delivery of quality broadcasting service to the American people. This is a vitally important matter, for it is essential to a democracy that its electorate be informed and have access to divergent viewpoints on controversial issues. Needless to say, thought had to be given to how much diversity to seek in terms of providing the best practicable service to the American public.[20]

100. *Prospective Rules.* While there can be no doubt that newspapers brought a pioneering spirit to broadcasting, first in radio and then in television, it does necessarily follow that new co-located coownership always would serve the public interest in the same way. In

[20] Sometimes there can be a clash between the goals of diversity and competition. Such is the situation in *Carroll* cases where we consider whether the addition of a station in a locality would damage an existing station's ability to program in the public interest, and whether the proposed station would function as a substitute for it. Leaving aside the quantum of proof required, at their core these cases say that the loss to the public is of such importance that even the goal of competition must take second place. It should be noted that the Commission's function is not to protect stations from competition and the public interest is not disserved even at a station's demise, so long as another takes its place in providing public service programming.

no way does this suggest a lack of recognition of the efforts made by the pioneers. Rather, it speaks to the issues raised when possible new entrants step forward. Now, unlike then, the broadcast medium has matured. While not all have made profits, for the most part, it is the particular market situation, or the newness of the operation that is the cause. Thus, the special reason for encouraging newspaper ownership, even at the cost of a lessened diversity, is no longer generally operative in the way it once was. Nor are newspapers the sole reservoir of experience on which reliance has to be placed. To the extent that TV (or radio) facilities are worth applying for, qualified and experienced applicants can be expected to step forward. Newspapers are not the only interested parties. The Commission is obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as it is, not was.

101. The thrust of recent rule changes in the area of multiple ownership as well as the underlying principles go in the direction of increased diversity. It appears that the licensing of a newspaper applicant for a new station in the same city as that in which the paper is published is not going to add to already existing choices, is not going to enhance diversity. In fact, since the number of channels open for filing has vastly diminished, the channel in question may be the last or one of the last available for the community. All this leads us to conclude that steps need to be taken in this regard. We think that any new licensing should be expected to add to local diversity. Accordingly, the rules will bar combinations that would not do so. Not all print media are equal or are generally circulated. Thus, we do not believe that weekly newspapers or specialized publications (including foreign language dailies) need to be included in the prohibitions we are adopting. Their situation would be different, for much of the audience of a station owned by such an entity would receive that entity's views for the first time. Each such publication is a relatively unimportant fraction of the media mix in a particular area. For this reason and because of the sheer size of daily newspapers, we shall limit the rule to daily [21] newspapers of general circulation. For the purpose of this rule, collegiate papers, even if dailies, are not considered to be circulated generally.

102. Since there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership, some limit needs to be placed on the geographic effect of the rule. We have decided to follow the parallel of the multiple ownership rule already adopted in this proceeding which bars new TV-radio combinations within certain specified contours, namely Grade A for television, 2 mV/m for AM and 1 mV/m for FM.[22] The rule would bar newspaper ownership if the predicted contours encompassed the city in which the daily newspaper is published.[23]

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[21] For this purpose we are using the print media definition of a daily, i.e., published 4 times a week or more, in contrast to weekly, semi-weekly, or tri-weekly publications.

[22] For an explanation of this rule, see para. 3 and footnote 2, *supra*.

[23] Any concern that this restriction could be avoided by simply proposing facilities sufficiently limited to prevent encompassment can be resolved when it is recognized that the Commission has already designated applications for hearing on "307(b) efficiency" issues when this happened in connection with the current multiple ownership rules. If the multiple ownership situation arguably would lead to artificial restrictions on station facilities, such matters could be explored in hearing.

103. The rule will apply to new ownership patterns however created, whether by initial application and construction or by acquisition. In fact, the latter category is perhaps an even greater cause for concern since there would be a loss of an already existing separate voice if a separately owned station were acquired by a paper. In addition, once a sale is to take place the rule would require a split in an existing combination. No divestiture would be effected nor hardship created since this is a voluntary action by the seller. Thus the rule will apply to all applications for assignment or transfer other than those to heirs or legatees or those for *pro-forma* changes in ownership.[24] In addition to barring daily newspapers from acquiring a station if any of the above-mentioned contours encompass the newspaper community, we shall prohibit grant of a renewal to any station which acquires such a newspaper.[25]

104. The new rule will apply to radio, as well as television applications. While on the one hand it could be argued that the larger number of radio facilities means there already is more diversity than in television, the fact is that we wish to encourage still greater diversity. This to us is a worthwhile goal which does not depend on its being urgent to be justified. Since diversity can be fostered through prospective rules without the fundamental disruption that would occur with altering all current ownership patterns, even a smaller gain is worth pursuing. Also this is the same approach we took in regard to radio-TV combinations, where it, too, could be argued that the numbers suggested no need for concern if a television station acquired a radio station. The effect of the new rule could also be expected to enhance at least to some degree competition in the media.

105. The portion of the multiple ownership rules being amended today has come to be known as the "duopoly" portion of those rules (as contrasted with the seven-station portion). Originally, the duopoly rules proscribed common ownership, operation, or control of two broadcast stations in the same broadcast service serving substantially the same area. Later the proscription was changed to proscribe common ownership, operation or control of two stations in the same broadcast service if specified contours of the stations overlapped (Grade B for television, 1 mV/m for AM and for FM). Then, at an earlier stage of this proceeding, the duopoly rules were amended to cut across broadcast service lines, namely, VHF television and radio. Today they are further amended to include daily newspapers.

106. In discussing duopoly in the preceding parts of this document we have, for the sake of convenience, spoken solely of common ownership of media. However, it is necessary to take cognizance of the other terms in the duopoly rule as well, since not only common ownership is proscribed, but also common operation or control. It is clear that under the original rule, a party owning 100% of an AM station

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[24] Parties believing that survival of both entities depends on their joint sale may make such an argument in seeking waiver of this requirement.

[25] As proposed in the *Further Notice*, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of its stations there within 1 year or by the time of its next renewal date, whichever is longer. If the newspaper is purchased less than a year from the expiration of the license, the renewal application may be filed, but it will be deferred pending sale of the station, if necessary, until the year has expired.

was prevented from owning 100% of another AM station serving substantially the same area. However, what if he owned 100% of one station and although having no ownership interest in the other he was a director or an officer thereof? Did such a position constitute "control" of the other station so that the proscription of the rule applied? What if a party had no ownership interest in either station but was a director of each, or was an officer of one and general manager of the other? What if he had a minority stock interest in one and was an officer of the other? Was this proscribed? The Commission, by ruling on such questions on a case-by-case basis over the years, has developed policy concerning them. In the earlier stages of this proceeding we indicated that the policy as originally developed for stations in the same broadcast service would be carried over and applied to such cross-interests in VHF and radio stations (22 F.C.C. 2d 306 at 324–5; 28 F.C.C. 2d 662 at 669–670). In the *Further Notice* (22 F.C.C. 2d 339 at 349) we proposed to apply the policy to any new rules that might be adopted herein with regard to newspapers and invited comments on the subject. Nothing filed in response to this invitation suggests a need for different treatment, and we shall therefore adhere to the policy in administering the new rules adopted today.

107. The Commission's present rules proscribing acquisition of common ownership of stations in different services in the same market apply with full force to VHF television stations. However, as to UHF stations, the prohibitions do not apply. Instead, a case-by-case approach is followed. After careful consideration we have decided not to follow this distinction in connection with newspaper-television common ownership. Arguably, some of the same reasons which applied previously and upon which the distinction was created might be said to be present here. Admittedly, there is some commonality in the two areas of the rules in terms of how we should treat UHF stations, but we see even more that is distinctive. Thus, the level of concern over common ownership of an FM station and a UHF television station (a matter handled on a case-by-case basis) is not the same as with a daily newspaper and UHF stations. The latter combination results in a much more imposing entity in most cases. Sometimes, of course, the broadcast-broadcast common ownership situation would raise a problem; hence we provide for treatment of these cases on an *ad hoc* basis. Here the reverse of the broadcast-broadcast combination situation is to be expected. Presumptively, the creation of new television station-daily newspaper combinations or a sale of an existing combination raises a problem. This may not always be the case, but since parties can seek waiver, there is a protection in the event that in a particular case our approach could be unduly harsh. We wish to act to encourage even greater diversity than we now have and think therefore that UHF should not be exempted as a matter of course. As to the view to be taken regarding the significance of operation on a UHF channel as it relates to the question of possible divestiture, discussed below, we believe that the cases need to be judged on their own terms and not based on any assumption that stations on UHF channels have an inferior position in the market. In only one of the cases where the question of possible divestiture exists does this apply, and from

the information now before us, exemption on this basis would not appear to be warranted.

108. *Divestiture.* We now turn to the most difficult of the questions before us: should divestiture be required? and if so, to what extent? We have been told by some parties that common ownership of a daily newspaper and a broadcast station raises such a problem as to require divestiture wherever the two entities are co-located. To some extent, in making this argument, reliance is placed on the economic strength of the combination, in terms of their revenues or the percentage of the market advertising revenues the two control. Others place reliance on circulation figures to show the power of the combination. In either instance, we are asked to require the current owner to divest in the hope or expectation that a change in ownership would bring public benefits. The principal benefit mentioned by others is the gain in diversity which the new owner would bring. Still others recognizing that disruption would attend the implementation of any such requirement urge it only in egregious cases. In part this is seen as a matter of fairness, in part it rests on the view that the need is not so great in other cases. We remain no less convinced than before of the importance of diversity, but this is not the only point to consider. Our examination of the situation leads us to conclude that we may have given too little weight to the consequences which could be expected to attend a focus on the abstract goal alone. There are a number of public interest consequences which form the basis of our concern. Requiring divestiture could reduce local ownership as well as the involvement of owners in management as many sales would have to be outside interests. The continuity of operation would be broken as the new owner would lack the long knowledge of the community and would have to begin raw. Local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too. None of these points was given consideration when we spoke in more sweeping terms at an earlier stage of this proceeding.

109. In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued. Entrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas. Particularly in connection with a number of entities, there is a long record of service to the public.[26] Under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped for gain in diversity is not enough. Unlike for prospective rules. divestiture introduces the possibility of disruption for the industry and hardship for individual owners.

110. We agree with the Justice Department that the Commission, like any other regulatory agency, must consider the anti-trust impli-

[26] A careful comparison has been made by the Commission's staff between like television stations differing only in whether or not they were owned by newspapers. The findings, attached hereto as Appendix C, show an undramatic but nonetheless statistically significant superiority in newspaper owned television stations in a number of program particulars. This material is derived from material contained in the first annual program report.

cations of its actions. Indeed, the relationship between anti-trust law and administrative law is necessarily a complementary one in which "the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of the anti-trust law is the same." *Northern Natural Gas Co.* v. *F.P.C.*, 399 F. 2d 953 at 959 (D.C. Cir. 1968). On the other hand, as Judge Wright succinctly stated in *Northern Natural Gas Co., supra*, 399 F. 2d at 960–961:

> This is not to suggest, however that regulatory agencies have jurisdiction to determine violations of the antitrust laws. See *People of the State of California* v. *F.P.C., supra*, 369 U.S. at 490, 82 S. Ct. 901; *United States* v. *Radio Corporation of America, supra*, 358 U.S. at 350, n. 18, 79 S. Ct. 457; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 223–224, 73 S. Ct. 990 (1943); *Mansfield Journal Co.* v. *FCC*, 86 U.S. App. D.C. 102, 107, 180 F. 2d 23, 33 (1950). Nor are the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest'." *F.M.C.* v. *Aktiebolaget Sevenska Amerika Linien, supra*, 390 U.S. at 244, 88 S. Ct. at 1009.

Accordingly, we have analyzed the basic media ownership questions in terms of this agency's primary concern—diversity in ownership as a means of enhancing diversity in programming service to the public—rather than in terms of a strictly anti-trust approach. Indeed, we have taken into consideration such matters such as potential disruption of the broadcast industry which may not have been relevant from an antitrust analysis, but are intimately involved with important public interest considerations which this agency cannot ignore.

111. The distinction between our approach and the Justice Department's is best put this way. Justice and others applying traditional anti-trust criteria are primarily interested in preserving competition in advertising.[27] They place a greater emphasis on public policies underlying the need to preserve competition than on diversity aspects and for their arguments they use analytic tools taken from economic studies of market share and the like. Conversely, the diversity approach would examine the number of voices available to the people of a given area.[28] The premise is that a democratic society cannot function without the clash of divergent views. It is clear to us that the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility. If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. This is not a reflection on the efforts of combination owners in diligently serving the public interest. Rather, it is a recognition that it is unrealistic to expect true diversity from a commonly owned station-newspaper com-

[27] This is not to suggest that we agree that any showing of higher prices has been made. The point was simply that Justice has applied a traditional competitive view whereas the Commission needs to look to other, even more vital, concerns as well. So it is too with the de Jonckheere approach to examining market concentration that does not give adequate attention to the core concern: diversity of programming service to the public.

[28] The Seiden approach is totally unrealistic in its inclusion of any publication or station that reaches even a small fragment of the market and moreover deals not at all with local issues.

bination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.

112. Having said that our primary concern is diversity in programming service, we have analyzed the question of requiring full-scale divestiture under standards and with regard for considerations which are relevant under our broad public interest mandate. This does not mean that the Justice Department's concern for economic competition is irrelevant; only that it is of secondary concern under the Commission's regulatory responsibilities.[29] After reviewing the record in this context, we believe that because of the disruption and losses which could be expected to attend divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases.[30] We have examined instances where there is co-located common ownership of a daily newspaper and a television and/or radio station to see which situations, if any, required action. In doing so we had to select some standards. As in all such efforts, the standards are not necessarily the only ones that could have been selected. We think the ones we have chosen are suitable and in fact preferable to other possible formulations. Nevertheless, we recognize that others would have preferred more or less stringent standards. A choice had to be made, and it had to rest on a valid and comprehensive foundation. We think it does, even if it is not the only possible formulation or does not represent the only point at which a balance could be struck. Before describing the standards it might be

[29] We shall examine allegations of economic monopolization which might warrant actions under the Sherman Act on an *ad hoc* basis in the future in those remaining circumstances where monopolization arguments might still be raised. (See para. 130, *infra*.) Moreover, we note that the Department of Justice, rather than submit data upon which industry-wide divestiture could be based, has offered general observations regarding the need for media competition and its concern about daily newspaper-VHF television combinations. Other parties have not had a proper opportunity to address the Department's separate filings with respect to the renewal applications for several stations and we doubt, in any event, that they would provide an appropriate basis for formulation of a general standard. Action on these pleadings will be taken in connection with the renewal applications in question. The Department has not offered us specific data in this proceeding on which to rely in applying anti-trust standards. Instead, it says that we are under an obligation to consider the competitive principles underlying the anti-trust laws. While we agree fully, we do not find that the data before us provide a footing for more severe action than we are taking. Divestiture has a substantial impact, and should be required only when we can determine that it is required by the public interest. We agree that it is not necessary to have proof of abuses before we can act, and we recognize that trading of stations would tend to lessen concern based on financial losses or investment uncertainty. However, we do not think that these considerations are a substitute for the requirement of a stronger showing than we have of the need for such a severe remedy on a broader basis. Even if some disruption occurs, we have acted to divest where competition and diversity are absent. Extending this to apply to all newspaper-television combinations, regardless of competition, is not warranted on the record before us and would cause serious public injury. We cannot rest upon an assertion that pricing may not be as competitive simply on the basis that it is "reasonable to assume" so. Merely stating that all daily newspaper-VHF television combinations are inconsistent with the public interest and the anti-trust laws is not enough. The Department urges that the degree of concentration is striking, but at present, 79 television stations are owned partly or wholly in common with daily newspapers published in the same locality. This number represents about 10.4% of the 757 commercial television stations on the air. If newspaper stations elsewhere are included the figure nears 14%, which is far below the 48% figure that obtained in 1948. A similar pattern of a continuing separation of daily newspapers and television stations in the same locality can be observed during the period of this proceeding. Thus, the 1970 figure of 96 co-located newspaper-television combinations dropped to 94 the next year and to 83 by April of 1974. By July of 1974 the figure had dropped still further to 79. Further reduction will take place as a result of our action here and through continuation of already begun changes in patterns of station ownership. We have drawn a line that is based on competition as well as diversity of voices and our experience suggests that there is neither need nor wisdom in going beyond it.

[30] There is another point, too, that with prospective rules as is the case with new applicants, even a small gain in diversity can be the basis for the requirement. Far more must be shown to warrant forcing an entity to dispose of its interest, and many cases lack any such urgency.

helpful to explain the criteria we used. We were greatly concerned about a lack of diversity that reaches a point sufficient to constitute an effective monopoly in the marketplace of ideas as well as economically. This did not mean, for example, that no magazines or other periodicals entered the market, or that no other radio or television station could be received there. Aside from the fact that such media outlets often had only a tiny fraction in the market, they were not given real weight since they often dealt exclusively with regional or national issues and ignored local issues. If they did deal with locally oriented issues, it was their own locality that was the focus. Such a situation does not bespeak a real diversity on vital issues of local concern. In fact, it is local issues on which so much decision making by the electorate is required, and on which the level of diversity provided by incoming media is lowest. Accordingly, we made an effort to determine whether diversity, real community-wide diversity, was present on such topics of local concern. As to prospective interests, we concluded that we were free to act to foster diversity without being concerned about negative impact from our action. As to interests already in existence, however, we concluded that a recognition needed to be given to such concerns and we used as a guideline whether a single full-fledged choice was available. We thought it would suffice, provided it was one which could be expected to deal with matters of local concern. In such cases there would not be such an unacceptable level of undue concentration. We looked then to incoming signals as a basis for exemption from divestiture.[31]

113. We examined all the instances known to us [32] of common ownership of the only daily newspaper with the only local radio or television station. Not all, it turned out, represented true monopoly situations, and stations were removed from the list if a direct competitor was found. In some of these instances, although only one station might be licensed to a city (such as Norfolk, Virginia) the truth is that the industry and local residents alike perceive the other stations licensed to other cities in the area (in that case Tidewater, Virginia which includes the cities of Hampton, Portsmouth and Newport News) as local, and they so function in terms of responding to local problems. In such cases, there is true (even if not unlimited) diversity. Sometimes, the situations were not so clear-cut.

114. Ascertaining and endeavoring to serve local needs was the key point, and some standard had to be developed to indicate where this was a reasonable expectation and where it was not. We did not believe that determining that a signal (regardless of whether it was city-grade, Grade A or Grade B) could be received, would suffice. We drew the line so as to require encompassment of the newspaper locality [33] by the

[31] Of course a daily newspaper competitor would equally well suffice to remove the combination from the ambit of the rules, but in these cases none were found.

[32] While we are reasonably sure about the information in question, absolute certainty is not possible. Neither at the Commission nor in any trade publication (print or broadcast) is there a definitive list of these common ownership situations. This information is called for only indirectly in station ownership reports and they are at best only a partial source of information. As a result we contemplate a change in the ownership reports to have specific disclosure of all media ownership.

[33] Although the rule does not rest on this premise, in each instance the location is identical to that of the co-owned station's community of license.

city grade signal [34] of another commercial television (or radio) station.[35] There are two reasons for selecting this standard. First of all, dependable coverage of the community in question would be provided, but even more importantly, because of the proximity of the station to the city in question, such stations could be expected to serve the needs of the newspaper locality as well as their own. While it is true that another signal level could have been used if we were only concerned with reception of the station, we do not believe that this would have been satisfactory. We think the focus properly belongs on the responsiveness of the outside station to local problems and needs. While the entertainment offerings of more distant stations garner many viewers, such is not the expectation for public affairs programs. Even if many did watch, little of this material could be expected to deal with problems of the newspaper community. It is unrealistic to imagine that these outside stations, not providing a city-grade signal, would be able to give meaningful responses to the needs of the distant newspaper locality, and it would be unfair to impose any such burden on them to attempt it. It is for these reasons that we cannot base our decision on overall viewing patterns as such. Rather, it must be on whether an outside station can be expected to provide meaningful attention to local problems and issues. Some would argue, no doubt, that all of these monopoly situations require divestiture even if a city-grade signal of an outside station encompasses the city in question. We see several problems with such an approach. First, some of these cases are labeled monopolies arbitrarily because only one channel is licensed to a particular city even though others are licensed to cities which together are part of a hyphenated market. Sometimes the residents of the individual communities themselves think of the area as joined together in the sense that local problems and their solutions transcend the borders of the separate cities involved. In such situations, the other stations in the market do direct themselves to the problems faced in common. In fact a question might well be raised in such situations if they did not do so. Even in situations where the communities involved are not so tightly bound, we believe that the attention to local problems outside stations could be expected to provide is sufficient to demonstrate the existence of adequate diversity. This is premised on the

[34] For AM and FM, the city-grade signal levels are 5 mV/m and 3.16 mV/m, respectively. For all stations, encompassment by a city-grade signal means the same as encompassment by a principal community contour.

[35] The question immediately arises of what to do about translators and satellites. As to the former, little could be expected in terms of coverage of diversity. The station whose signal is translated is often quite far away and the existence of a translator has no bearing on the stations' obligation regarding ascertainment of community problems. In effect then, even if the translator provides a dependable signal throughout the monopoly community, it cannot be relied upon to bring in a service attuned to the needs of the monopoly community. Satellites present a more difficult problem as they do operate with more substantial facilities and the primary station is obliged to carry some programming attuned to the needs of the satellite community. We do not believe that this is sufficient to demonstrate diversity unless the satellite has a local studio from which public affairs and news programs can and do originate. Such a station (in effect a semi-satellite) would suffice to demonstrate diversity. Educational stations are not under an obligation to provide the full range of responsive programming as are commercial stations, and we cannot ignore their specialization. It is more than lack of commercials that sets them apart. Since they cannot be equated with commercial stations, we shall not exempt based on encompassment by an educational station. So too with foreign stations which have no obligation to serve the needs of their American audiences or to deal with issues of concern to them.

efforts of these stations to ascertain and endeavor to serve the needs of a monopoly community which they encompass with a city-grade signal,[36] efforts which need be undertaken. Although we continue to believe that divestiture is a harsh remedy, one to be reserved only where the need is overwhelming and the evidence unambiguous, it is equally clear that in some circumstances, no other answer can be given. We believe such to be the case where two city-grade signals are not present that offer an effective juxtaposing of views on local issues. In our view, this country can ill afford a monopoly on the expression of views of issues of local concern. This basis for divestiture, however, is a far cry from one based only on some theoretical increase in already existing diversity which might follow from such action and would ignore the ramifications of such a step. Accordingly, we do not believe that further divestiture can be defended.

115. Up to this point we have not attempted to distinguish radio stations from television stations in terms of the need for divestiture or to indicate the reasoning underlying our views on each. As will be clear from the discussion which follows, we are applying the same standards to a radio monopoly co-owned with a monopoly newspaper as we have to a television monopoly with a newspaper connection. Radio and television are given parallel treatment, based on encompassment by a city-grade signal. We are not unaware of the fact that in the cases where the television station and newspaper are the only ones of each in the locality, a city-grade radio signal may very well encompass the city.[37] This fact, in our view, is not sufficient to change matters. Realistically, a radio station cannot be considered the equal of either the paper or the television station in any sense, least of all in terms of being a source for news or for being the medium turned to for discussion of matters of local concern. When the weight of a daily newspaper and the commonly owned television station (perhaps with a radio station or even an AM–FM combination under common control) are combined, the radio station standing by itself cannot be considered as providing significant diversity or as constituting a meaningful competitor at all. Accordingly, the rule shall not provide an exemption based on encompassment of the monopoly television-newspaper community by a radio station as would be the case for encompassment by a television station. Weekly newspapers, likewise, have too small an impact in comparison to the daily newspaper-television station combination to provide a basis for an exception.

116. As to the situations where there is no local TV station and the only radio stations are owned in common with the only daily newspaper, we are of the view that the combined importance of the daily newspaper and the radio station(s) [38] is akin to that of a television-newspaper combination in the television cities. It must be remembered

[36] Stations have a secondary obligation to provide service to areas outside their city of license. In a number of instances stations which place city-grade signals over monopoly communities are addressing themselves to the problems, needs and interests of those communities. Stations in a similar posture should recognize and undertake to serve, on a secondary basis, these monopoly communities.

[37] In fact, such ordinarily would be our expectation, as a community large enough to support a television station could be expected to have a number of radio stations, at least one of which would be separately owned from the newspaper.

[38] In some instances AM stations alone, in others AM–FM combinations.

in this connection that there is no local television station to which the local residents can turn and in most cases no incoming city-grade television signal from another community. (In one case, that of Miles City, Montana, there is a television station licensed to serve that community, and we believe this fact sufficient to demonstrate adequate diversity.) Also, because of the much greater number of licensed radio stations, the expectation would be that a choice of signals would be the norm. Thus, the places lacking any other city-grade radio signal [39] could be viewed as isolated. In the smaller non-television communities, radio stations play a truly vital part in local affairs and their efforts and importance can exceed the level reachable by television stations in larger markets. These media outlets are a much more central focus in these smaller communities. Even if a television city-grade signal encompasses the newspaper-radio monopoly community it does not follow that the station would provide effective diversity in that community. The outside television station would not be expected to be attuned to meeting the local problems, needs, and interests of these smaller newspaper-radio communities.

117. The rules we have fashioned will prohibit the monopoly situations described above and will require divestiture no later than January 1, 1980.[40] In the case of newspaper-television station monopolies either property could be sold.[41] In the case of radio-newspaper monopolies either the newspaper or a radio station would have to be sold, so if there were an AM–FM combination involved, the affected party need only dispose of one of the stations.[42] Since AM–FM combinations are not precluded by the rules, the AM–FM combination could be sold together.[43] Our goal, the creation of a competing source of news and public affairs programming attentive to the needs of the locality, could be thwarted if appropriate protections were not included to insure compliance with the requirements of the new rules. Thus, for example, there is a need to protect against a station's being offered for sale at a price out of keeping with its true value so that the owners could seek waiver on the basis of the inability to dispose of the station. We expect the parties involved to proceed in good faith. In connection with any attempt to show the inability to dispose of an interest to conform to the rules, we shall not give any weight to a showing that does not include a full description of the effort made to sell that interest, the price at which it was listed and a certification of a station (or if it applies, newspaper) broker that in his view this price is consistent with the fair market value of the station (or newspaper) in question.

[39] The reference is to daytime coverage, and the reason for this is quite simple: the data on file at the Commission do not suffice to give an accurate current picture of nighttime AM coverage without the most painstaking examination of each case and a total restructuring of the maps and other data submitted by the stations to take into account all subsequent developments.

[40] This period of five years represents to us a proper balance between the private equities involved and the need for such dispatch as circumstances allow.

[41] If the present owner preferred, both the newspaper and the station could be sold but it would have to be to separate buyers.

[42] Some of the affected AM stations are full-time stations; others are daytime-only. Compliance may be achieved by divesting either of the stations regardless of its hours of operation, or by divesting both if that is preferred.

[43] We would not consider it compliance if a station were acquired solely to be divested and our expectation is that divestiture of a station not yet on the air would not constitute compliance with the rules.

118. We anticipate a number of waiver requests. The following discussion sets forth some of the circumstances in which waivers, either permanent or temporary, might be granted.[44]

119. It is not our intention that the rules should work a forfeiture.[45] The rules are not in the least premised on the existence of improprieties in the operation of the media holdings. Thus, only a sale, not a loss is contemplated. For this reason, inability to sell the station would be a basis for waiver. Otherwise a refusal to grant a further renewal of license to the present licensee would work a forfeiture, a result contrary to our intent. We would take a similar view if the only sale possible would have to be at an artificially depressed price.[46] Likewise, if it could be shown that separate ownership and operation of the newspaper and station cannot be supported in the locality, waiver might well be appropriate. In any of these instances we contemplate waivers of reasonable duration, so that we shall not always be bound by a result based on outdated information. Finally, if it could be shown for whatever reason [47] that the purposes of the rule would be disserved by divestiture, if the rule, in other words, would be better served by continuation of the current ownership pattern, then waiver would be warranted. However, we would not be favorably inclined to grant any request premised on views rejected when the rule was adopted, as we do not intend to relitigate resolved issues.

120. On our own motion, in two cases we are exempting stations from divestiture because it is clear that for each case a waiver would be warranted. At Hickory, North Carolina, the television station operates on a UHF channel with highly limited facilities and without a network affiliation. Whether by net weekly circulation or any other measure, the station, its audience and hence its impact, is minor. Consequently, there appears to be little basis for expecting any interest to be shown in acquiring this station. With Brookfield, Missouri, in the radio station list, it is equally clear that it is not on equal footing with the others in the group. By various indicia, both the station and the community are significantly different from the others. To neither of the above licensees would it be fair to insist that they go to the expense of filing a waiver request when the outcome is clear. Therefore we shall act now.

121. As to others desiring waiver we wish to make it clear that we do not contemplate holding evidentiary hearings on the individual

[44] The stations required to divest are listed in Appendix D and Appendix E to this document. As explained earlier (see fn. 33), the list is not to be taken as definitive. There may be additional stations within the ambit of the rules that do not have city-grade encompassment but nonetheless were not found in our search. Conversely, we may have included stations in the list that do not fit within the ambit—that for one reason or another should not have been included. Licensees of such stations can call such situations to our attention.

[45] Nevertheless, in recognition of the fact that we are requiring divestiture, we shall issue tax certificates to these parties pursuant to 26 U.S.C. 1071. We shall also do so in non-divestiture cases where current combinations are sold to separate owners in order to come into compliance with the new policy underlying the rule. We took this view earlier in this proceeding as to broadcast combinations—see the 1971 Memorandum Opinion and Order (28 F.C.C. 2d 662 at 671) and the Public Notice of July 16, 1970, FCC 70-744.

[46] An appropriate showing would have to be made of the fair value and the inability to obtain such a price. Also, as with inability to sell at all, we do not contemplate permanent waiver, for problems in disposing of these interests would not be expected to endure indefinitely.

[47] Among others that parties may wish to bring to our attention are local access or origination on the community's cable television system or other special circumstances they think have a bearing on the appropriateness of granting waiver.

waiver requests unless there are substantial issues of fact to be resolved. Legal, as distinguished from factual issues, can just as well if not better be resolved without the need for an evidentiary hearing. An evidentiary hearing on the other hand could only cause delay and unnecessary expense to all concerned. There is no requirement for the holding of an evidentiary hearing imposed by law absent the raising of substantial factual issues and we shall not take on a pointless task.

122. The current state of the economy may suggest to some that any station sales could only be at a depressed price, but as pointed out previously, there is no need to sell now if it is more advantageous to wait. With a 5-year grace period for compliance, particular market conditions or even an overall market down turn would not provide a basis for obviating the divestiture requirement, unless such a condition were to last the full five-year period. Such a turn of events does not seem plausible, but even if we thought it were, any action on this basis would have to await future happenings. In the meantime, we expect that parties wishing to seek waiver of the divestiture requirement will file their requests within 6 months of the publication of this document in the Federal Register. This should be sufficient time to properly assay the applicable circumstances and to prepare even a lengthy request. We are not prepared to consider late-filed requests unless based on changed circumstances which would not have been anticipated.

123. *Miscellaneous Matters Relating to New Rules.* We have been urged to exempt Puerto Rico from any rules we might adopt. Whatever action might have been required if any divestiture were to take place there, the fact is that no divestiture is required. The arguments we have been offered dealt mostly with existing and not future ownership combinations. In our view, the need for diversity is no less great in Puerto Rico than elsewhere, and we see no less need to apply the prospective rules there. To the extent a prospective applicant believes that special circumstances warrant deviation from the new requirements, it is at liberty to seek waiver to permit acceptance of a nonconforming application.

124. The suggestion has been made that we should act to help insure that ownership of any divested station should pass to minority group ownership. Secondarily we were urged to act similarly to encourage assignment to local (preferably minority) owners. The trouble with this request is that it appears to run afoul of Section 310(b) of the Communications Act of 1934, as amended. That provision specifically bars the Commission from considering whether the public interest would be served by transferring ownership to a party other than the one proposed in the application filed with the Commission. We inquired of the party urging this approach how it could be done consistent with Section 310(b) and were not offered any persuasive basis for believing it could be done. Accordingly, we shall not adopt such a requirement even obliquely as we were urged through requiring the assignor/transferor to attempt to find a buyer in keeping with the priorities urged by NCCB. However, it is clear that few stations are licensed to minority group owners. Divestiture might be an occasion for affected parties to consider this fact in reaching their decisions, but no requirement to this effect will be adopted.

125. *Impact on comparative hearings involving regular renewal applicants.* Under the rules adopted herein, only a small number of co-owned broadcast-newspaper combinations are required to divest and no co-owned TV-radio combinations must do so. This raises a question as to the effect our action taken today will have on comparative renewal proceedings when licensees not required to divest apply for renewal of license and are challenged by a competing applicant. The answer to that question lies in the following discussion of our 1970 "Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants" (22 F.C.C. 2d 424).

126. In that statement we attempted to balance the benefits received by the public from the statutory spur inherent in the fact that there can be a challenge at renewal time against the value of not undermining predictability and stability of broadcast operation. The balance was struck by adopting a policy which provided that if a renewal applicant could show in a hearing with a competing applicant that its program service during the preceding license term had substantially met the needs and interests of its area (and that the operation of the station had not been characterized by serious deficiencies) the renewal applicant was given a controlling preference over the new applicant. In adopting this policy, we stated that as to the Commission's rules and policies governing diversification of the media of mass communications, where a renewal applicant with other media interests had in the past been awarded a grant as consistent with those rules and policies and thereafter rendered service that substantially met the needs and interests of its area it would be unfair and unsound to permit him to be ousted on the basis of a comparative demerit because of his media holdings. Our position was that as a general matter the renewal process is not an appropriate way to restructure the broadcast industry. Rather, we stated, this should be done in rule making proceedings.

127. The 1970 Policy Statement was struck down by the Court in *Citizens Communications Center* v. *F.C.C.*, 447 F. 2d 1201 (1971). The basis of the Court's action was that in a comparative hearing involving a regular renewal applicant, the Communications Act and *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945), require a single full hearing in which the parties may produce evidence and be judged on the basis of all relevant criteria. It was the view of the court that the 1970 Policy Statement provided for a full comparison of the renewal applicant and the challenger only in cases where in the initial stage of the hearing the incumbent could not show a past record of substantial service without serious deficiencies. In other cases, the Court said, the challenger was given no hearing at all.

128. In ruling the 1970 Policy Statement illegal, the Court said (at fn. 33):

> Thus, without impinging at all upon the Commission's substantial discretion in weighing factors and granting licenses, our holding today merely requires the Commission to adhere to the comparative hearing procedure which it has followed without fail since *Ashbacker* and which has rightly come to be accepted by observers as a part of the due process owned to all mutually exclusive applications.

However, in such a single full comparative renewal hearing the Court observed that superior performance by an incumbent licensee should

be a plus of major significance. This is because "[t]he court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." (At fn. 35.) Nonetheless, it was the Court's view that "[d]iversification is a factor properly to be weighed and balanced with other important factors, including the renewal applicant's prior record, at a renewal hearing." (At fn. 36.)

129. After the decision in *Citizens Communications Center*, the Commission (noting the doubts expressed by the Court as to procedures made by the Commission in adopting the 1970 Policy Statement) issued a Further Notice of Inquiry in Docket No. 19154 (31 F.C.C. 2d 443 (1971))[48] inviting views of interested parties on the formulation of policy in this area that would be consistent with the Court's holding that a full hearing is required. That proceeding is still pending. The Commission has recently announced its intention to consider in the near future what its policy should be in this regard, but has not yet resolved the point. In the light of *Citizens Communications Center*, whatever policy is developed will take into account diversification as a factor that must be considered in a comparative renewal hearing. Also in the light of that case, the weighing of factors lies within the substantive discretion of the Commission, and the weight to be given the factor of diversity in comparative renewal hearings remains to be determined. Until such time as a new policy is formulated in Docket No. 19154, of necessity, under *Citizens Communications Center*, the factor of diversification must be considered in comparative renewal hearings, but the weight to be given that factor will be a matter within the discretion of the Commission. In connection with both any policy that may be developed and with comparative renewal proceedings that may occur before the development of such policy, we reiterate what we have said on another occasion (31 F.C.C. 2d 443 at 445), that we do not believe the Court in *Citizens Communications Center* is seeking to have the ownership patterns of the broadcast industry restructured through the renewal process; that, rather, any *overall* restructuring should be done in a rule making proceeding. And what we consider to be the necessary *overall* restructuring has been done today.

130. During the pendency of this proceeding, in situations involving petitions to deny renewal applications, the Court has approved our policy of refusing to consider questions of concentration of control unless specific abuses are shown. (*Hale* v. *F.C.C.*, 425 F. 2d 556 (D.C. Cir. 1970); *Stone* v. *F.C.C.*, 466 F. 2d 316 (D.C. Cir. 1972); *Columbus Broadcasting Coalition* v. *F.C.C.*, —— F. 2d —— (D.C. Cir. 1974.)) Parties as of now may raise concentration issues in connection with such petitions. However, absent a showing of economic monopolization that might warrant actions under the Sherman Act, it would not be our view that such arguments would raise valid issues necessitating the designation of renewal applications for hearing. (See fn. 29, *supra*.) We should make clear at this time that since the stations which are subject to the divestiture provisions are in effect under an order to terminate their present cross-ownership there would be no point in

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[48] The Commission had previously issued a Notice of Inquiry in that docket (27 F.C.C. 2d 580 (1971)) to explore whether standards of "substantial service" could be developed for television broadcasting.

conducting protracted comparative hearings concerning those facilities during the interim period. Our finding that divestiture is required would obviously weaken their position in a comparative proceeding, but since we have determined that their present operations should be divested without regard to the quality of their service, as a means of improving the pattern of ownership, we think it would be inequitable to subject them in their present posture to competitive challenge. Furthermore, any comparative hearings at renewal time would probably run through the date when divestiture must be accomplished; this would create a chaotic situation. In view of these considerations, interested parties should be advised that we do not contemplate conducting comparative hearings in the usual course when these licenses come up for renewal.

131. *Policy Regarding Non-Divestiture Combinations.* As we had occasion to observe in the earlier discussion of the comments, a number of parties argued for (or suggested as a substitute for a separation in ownership) requirements to insure separate operation of jointly owned media entities. Although we were not persuaded that their arguments offered a valid basis for obviating the need for divestiture, or for requiring separation in ownership on a prospective basis, we are persuaded that valid points exist in this argument. Various combination owners have stressed that their two media interests—print and broadcast—are operated separately. Even if separate operation cannot be equated with separate ownership, it is nonetheless an important point. Were it otherwise and the two operated jointly, it might have been necessary for the Commission to act to require divestiture in many more situations. If the power of the print-broadcast combination were exercised monolithically or if the print and media outlets were mirror images of one another, speaking with one voice, we would have to be concerned. In the divestiture cases, we held that even in the absence of specific abuses, the need to provide at least minimal diversity required action. As to the remaining instances of combination ownership, we believe some clarification in our expectations is required.

132. Many of the parties owning newspapers and broadcast stations in the same locality described how the two entities—print and broadcast—were separately operated. We were told that separate editorial and reportorial staffs were utilized. Many pointed to a separation in sales staff and an emphasis on competition between media. We endorse such efforts to insure a maximum of diversity and competition possible under the circumstances of common ownership and we commend those conscientious owners for their efforts.[49]

133. Based on the foregoing discussion, IT IS ORDERED, pursuant to the authority contained in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended, That Sections 73.35, 73.240 and 73.636 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix F, effective February 12, 1975, the date of publication of this document in the Federal Register. All

[49] We do not intend any change in the traditional view taken regarding activities by the media which run afoul of the anti-trust laws. Common ownership in itself does not constitute an abuse. The subject of combination rates and joint sales practices is under consideration in a rule making proceeding in Docket No. 19789.

applications not granted by that date shall be subject to the new rules. Since these rules embody important new policy having widespread effect, we believe that it is in the public interest to make the effective date February 12, 1975, rather than to delay the effective date to a time at least 30 days after publication in the Federal Register. 5 U.S.C. 553(d)(3).

134. IT IS FURTHER ORDERED, That the provisions of newly adopted Section 73.35(c) barring common ownership of the only AM station and a daily newspaper, and Section 73.636(c) barring common ownership of the only television station and daily newspaper ARE WAIVED insofar as they apply to such existing newspaper-broadcast combinations in Brookfield, Missouri, and Hickory, North Carolina.

135. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

PARTIES FILING COMMENTS AND REPLY COMMENTS IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING IN DOCKET NO. 18110

Advance Publications
The Alexandria Gazette
All Channel Television Society
Allied Daily Newspapers of Washington
American Broadcasting Companies, Inc.
American Institute for Political Communication
American Newspaper Publishers Association
Argus-Press Company
Arkansas Democrat Company
Arkansas Television Company
Auburn Publishing Company
Baton Rouge Broadcasting Co., Inc.
A.H. Belo Corporation
Robert W. Bennett
Joseph F. Biddle Publishing Company
Broadcast-Plaza, Inc.
Broadcasting and Film Commission, National Council of the Churches of Christ in the U.S.A.
Brockway Company
Buffalo Evening News, Inc., et al
Bulletin Company
Canton Daily Ledger
Capitol Broadcasting Company
Capitol Broadcasting Company, Inc.
Carter Publications, Inc.
Cedar Rapids Television Company
Channel 6, Inc.
Chronicle Publishing Company, et al
Coffeyville Publishing Company, Inc.
Columbia Broadcasting System, Inc.
Columbus Broadcasting Company, Inc.
Cosmos Broadcasting Corporation
Cox Broadcasting Corporation
Daily News
Daily News-Tribune
Daily Pantagraph
Daily Press, Inc.
Daily Record
The Day
Denton Record Chronicle
Dodge City Broadcasting Co., Inc.
Duhamel Broadcasting Enterprises
Easton Publishing Company
Elyria-Lorain Broadcasting Co.
Enterprise Publishing Company
Evening News Association
Evening Star Newspaper Company
Express Communications, Inc.
Finley Broadcasting Company, et al
Fisher's Blend Station, Inc.
Florida Publishing Company
Helene R. Foellinger
Fort Myers Broadcasting Company
Forum Publishing Company, et al
Forward Association
Forward Communications Corporation
C. D. Funk
Galesburg Broadcasting Company
Gazette Printing Company, et al
Gazette Publishing Company
General Electric Broadcasting Company, Inc.
Richard Gilkey
Gray Communications Systems, Inc.
Green Bay Newspaper Company
Grit Publishing Co.
Guaranty Broadcasting Corporation
Guy Gannett Publishing Co., et al

PARTIES FILING COMMENTS AND REPLY COMMENTS IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING IN DOCKET NO. 18110—Continued

Ethel C. Hale, et al
Hearst Corporation
Herald Association, Inc.
Herald Corporation
Houston Post Company, et al
William F. Huffman Radio, Inc.
HUSE Publishing Company, et al
Illini Publishing Company
Illinois Broadcasting Company, et al
International Broadcasting Corporation, et al
Jacksonville Journal Courier Co.
Jefferson Standard Broadcasting Co.
Jet Broadcasting Co., Inc.
Terrall M. de Jonckheere
Journal Company
Journal Review
Kansas State Network, Inc.
Kenosha News
Kid Broadcasting Corporation
KMSO-TV, Inc., et al
KGVO Broadcasters, Inc. and KMSO-TV, Inc.
KSLA-TV, Inc.
KUTV Inc., et al
Lawrence Daily Journal-World
Harvey J. Levin
Lexington Heraldleader Co.
Ed Livermore
Macomb Daily Journal
Marshfield News-Herald
McClatchy Newspapers
McClure Newspapers, Inc.
Medford Daily Mercury
Medford Mail Tribune
Meyer Broadcasting Company
Michigan Press Association
Mickelson Media, Inc., et al
Midcontinent Broadcasting Company
Midnight Sun Broadcasters, Inc.
Midwest Radio-Television, Inc.
Midwestern Broadcasting Company
Minneapolis Star and Tribune Company
Mississippi Publishers Corporation
The Monitor
Multimedia, Inc.
National Associations of Broadcasters
Exhibit A
Exhibit B
Exhibit C
Exhibit D
Exhibit E
National Broadcasting Company, Inc.
National Newspaper Association
Nebraska Broadcasters Association
New England Daily Newspaper Association
Newhouse Broadcasting Corporation
The New Mexican
New York News, et al
North Carolina Association of Broadcasters
North Carolina Television, Inc.
Ogden Newspapers
Ohio Newspaper Association
Oklahoma Broadcasters Association
Oklahoma Press Association
Owensboro Publishing Company
Paducah Newspapers, Inc.
R. W. Page Corporation
Palestine Herald-Press Company
Palmer Broadcasting Company, et al
Palmetto Radio Corporation
Peninsula Newspapers Incorporated
Pioneer Valley Broadcasting Co., et al
The Post Company
Pottsville Republican
Progress Broadcasting Corporation
Progressive Publishing Company, Inc.
Pulitzer Publishing Company
Quality Broadcasting Corporation
Quincy Newspapers, Inc., et al
Radio Medford, Inc.
Reporter Printing Company
Ridder Publications, Inc.
Rock Island Broadcasting Company, et al
James N. Rosse
Salina Radio, Inc.
Santa Barbara News-Press
Sarkes Tarzian, Inc.
John C. Schmarkey
Scottsbluff Daily Star-Herald
Scranton Times
Scripps-Howard Broadcasting Company, et al
South Bend Tribune
Southern Minnesota Broadcasting Company
Stanford University, Research Center in Economic Growth
Stauffer Publications
Students' F.C.C. Study Group
Summit Radio Corporation
Telegraph-Bulletin
Telemundo, Inc., et al
The Times Company
Times Herald Printing Company
Triangle Broadcasting Corporation
Tribune Company, et al
Tribune Publishing Company
Truth Publishing Company, Inc., et al
United States Department of Justice
Vindicator Printing Company, et al
George R. Walker
Washington Post Company, et al
WBNS-TV, Inc., et al
WEEU Broadcasting Company
Westinghouse Broadcasting Company, Inc.
West Virginia Radio Corporation

PARTIES FILING COMMENTS AND REPLY COMMENTS IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING IN DOCKET NO. 18110—Continued

WFLA, Inc.
WGAL Television, Inc., et al
WHAS, Inc.
Wichita Falls Times, et al
Williamson County Sun
Wisconsin Daily Newspaper League
WJAC, Incorporated, et al
WKBN Broadcasting Corporation
WKRG-TV, Inc.
The Woonsocket Call
World Publishing Company
WSM, Incorporated

PARTIES FILING REPLY COMMENTS

American Newspaper Publishers Association
Stephen R. Barnett
City Club of New York
Donrey, Inc.
Alfred H. Hemingway, Jr.
Dr. Harvey J. Levin
McClatchy Newspapers
National Association of Broadcasters
National Newspaper Association
Tribune Company, et al
WGAL Television, Inc., et al

PARTIES FILING COMMENTS IN RESPONSE TO MEMORANDUM OPINION AND ORDER ANNOUNCING ORAL ARGUMENT

American Broadcasting Companies, Inc.
American Newspaper Publishers Association
Les Anderson
Charles A. Baer
Buffalo Evening News, Inc. and WBEN, Inc.
Center for Policy Research, Inc.
Channel Two Television, Inc.
Chronicle Publishing Company and Chronicle Broadcasting Co.
Civil Liberties Union of Alabama and The Selma Project
Columbia Broadcasting System, Inc.
Cox Broadcasting Corporation
Donrey, Inc.
Duhamel Broadcasting Enterprises, Inc.
Effingham Broadcasting Company
Evening News Association, Lee Enterprises, Incorporated, and WKY Television System, Inc.
Gardner Advertising Company, Inc.
Houston Post Company (see Channel Two Television, Inc.)
Huntingdon Broadcasters, Inc.
Illinois Broadcasting Co., Inc. and Lindsay-Schaub Newspapers, Inc.
Justice, U.S. Department of
KCEN-TV (Channel 6, Inc.)
KSL, Incorporated
Labor Union News, Inc.
McClatchy Newspapers
McKenna, Wilkinson & Kittner
Metromedia, Inc.
Midwest Radio-Television (WCCO)
Minneapolis Star and Tribune Company
National Association of Broadcasters
National Broadcasting Company
National Citizens Committee for Broadcasting
National Newspaper Association
Omaha World Herald
The Post Company
Post-Newsweek Stations, Capital Area, Inc.
Progressive Publishing Company and Clearfield Broadcasters, Inc.
Pulitzer Publishing Company and KSD/KSD-TV, Inc.
Rocky Mountain Broadcasters Association
Summitt Radio Corporation
Telemundo, Inc. et al.
UHF Television Stations
George R. Walker
WJAG, Inc.
WKRG-TV, Inc.
WTMJ

PARTIES FILING REPLY COMMENTS IN RESPONSE TO MEMORANDUM OPINION AND ORDER ANNOUNCING ORAL ARGUMENT

American Newspaper Publishers Association
Buffalo Evening News, Inc. and WBEN, Inc.
Center for Governmental Responsibility
KSL, Incorporated
KUTV, Inc. et al.
The Post Company
Post Newsweek Stations, Capital Area, Inc.

APPENDIX B

Major Studies Submitted in Docket No. 18110 in Response to Further Notice of Proposed Rulemaking

ECONOMIC CONSEQUENCES OF DIVESTITURE

ANPA Comments, Volume II:
(a) Study A—Frazier, Gross Associates, *Valuation of Newspaper Owned TV and Radio Stations.*
(b) Study B—First National City Bank, *Financial and Investment Issues of Forced Divestiture.*

EFFECTS OF COMMON OWNERSHIP ON COMPETITION

J. Rosse, B. Owen, D. Grey, *Economic Issues in Joint Ownership of Newspaper and TV Media* ... ford University Research Center in Economic Growth Memorandum No. 97):
(a) See especially Appendix 1: B. Owen, *Empirical Results on the Price Effects of Joint Ownership in the Mass Media.*
J. Rosse, *Credible and Incredible Economic Evidence* (Reply Comments).
NAB Comments, Exhibit B (Revised): A. Lago and D. Osborne. *A Quantitative Analysis of the Price Effects of Joint Mass Communication Media Ownership.*
NAB Reply Comments:
(a) Appendix C: Addendum to Lago and Osborne (Exhibit B of NAB comments).
(b) Appendix D: Note by NAB Research Staff re: regression analysis of audience effects on price.
Appendix Note to Dr. Harvey Levin's reply comments.

EFFECTS OF COMMON OWNERSHIP ON STATION PERFORMANCE

Students' FCC Study Group, Comments filed by Albert Kramer, May 1971.
H. Levin, *The Policy on Joint Ownership of Newspapers and Television Stations: Some Assumptions, Objectives, Effects.*
H. Levin, Reply Comments.
ANPA Reply Comments, Appendix C: J. Udell, *Critique of Harvey Levin's Comments.*
NAB Reply Comments, Appendix B—on Levin's statement.
The American Institute for Political Communication, Washington, D.C., 1971, *The Effects of Local Media Monopoly on the Mass Mind.*
NAB Comments, Exhibit E: J. Anderson. *The Problem of Information Control: A Content Analysis of Local News Publication.*
Cox Broadcasting Corporation Comments:
(a) Appendix A: W. McDougald and E. Sasser, et al., *Atlanta Market News and Editorial Research Study.*
(b) Appendix B: J. Anderson and D. O. McDaniel, et al., *Two Studies: A Historical Analysis and Content Comparison of Cox Broadcasting Corporation's Affiliated News Media in Dayton, Ohio.*

MULTIPLICITY AND DIVERSITY OF MEDIA

NAB Comments, Exhibit C: C. Sterling, *Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets: 1922–1967.*
Study E—Staff Study by ANPA.
Study E—J. Udell, *Economic Consequences of FCC Proposal and Critique of Relevant Literature.*
NAB Comments, Exhibit A: M. Seiden, *Mass Communications in the United States, 1970 and Reply Comments of Stephen R. Barnett.*
ANPA Comments, Volume II, Study C: W. Wilcox, *Newspaper Journalism, Broadcast Journalism and the Community.*
Monopoly in the Media, by Terrall M. deJonckheere.

Further Studies Submitted in Docket No. 18110 in Response to Memorandum Opinion and Order Announcing Oral Argument

ECONOMIC CONSEQUENCES OF DIVESTITURE

No further empirical studies.

EFFECTS OF COMMON OWNERSHIP ON COMPETITION

Comments of Buffalo Evening News and WBEN Exhibit VIII.
Comments of Post-Newsweek Stations.
Supplementary Comments of Professor Harvey Levin.

EFFECTS OF COMMON OWNERSHIP ON STATION PERFORMANCE

Supplementary Comments of Professor Harvey Levin.

MULTIPLICITY AND DIVERSITY OF MEDIA

Comments of Metromedia (Attachments A–D).
Supplemental Comments of the Chronicle Publishing Co. and Chronicle Broadcasting Co.—Volume 1.
Supplement to National Association of Broadcasters Exhibit C Regarding Cross-Ownership of Broadcasting Stations and Newspaper; Supplemental Statement of NAB; Exhibit F Regarding Recent Transfer of Broadcast Stations (Revised).
Comments of Buffalo Evening News and WBEN—Exhibit VII.

APPENDIX C

Staff Study of 1973 Television Station Annual Programing Reports*

SUMMARY

It was found that on the average, co-located newspaper-owned TV stations programed 6% more local news, 9% more local non-entertainment, and 12% more total local including entertainment than do other TV stations. A regression analysis technique was used which holds constant the effects of the following factors: network affiliation, UHF or VHF, group ownership, revenue size, total minutes broadcast during the week and number of commercial stations in market. In each case these differences were statistically significant.

Prepared by: Research and Education Division of the Broadcast Bureau.

STAFF STUDY OF 1973 TV STATION ANNUAL PROGRAMING REPORTS

One of the questions raised in the current cross-ownership inquiry, is whether newspaper owned co-located TV stations program differently than other TV stations, with respect to news, public affairs or other non-entertainment programs, other factors being equal. In order to investigate this question the staff has studied the 1973 Annual Programing Reports, specifically the 18 program categories and day parts shown in Table 1. We find that for the sample composite week reported by the TV stations on their annual report, those stations owned by co-located newspapers broadcast significantly more minutes in several categories of local programing.

Methodology

A reduced form station model of local and public service programing was specified and then regression analysis was used to evaluate the model with each of the eighteen program categories as dependent variables. This method permits one to "hold constant" the other factors in the relationship.

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*None of the previous studies submitted by the parties had these reports yet available to them when they were prepared. Thus, Levin used data taken from *TV Guide* for his studies.

The programing model was specified as:

$$P=b_0+b_1X_1+b_2X_2+b_3X_3+b_4X_4+b_5X_5+b_6X_6+b_7X_7+b_8X_8+e.$$

where P = minutes of program, category broadcast during the 1972–1973 composite week
X_1 = Channel type (VHF or UHF; VHF=1)
X_2 = CBS affiliation (Dummy variable, CBS=1)
X_3 = NBC affiliation (Dummy variable, NBC=1)[1]
X_4 = Newspaper joint ownership in same market (Dummy variable=1 if joint owned)
X_5 = Group ownership (Dummy variable=1 if group owned)
X_6 = Station revenue in thousands of dollars
X_7 = Number of commercial stations in station's market
X_8 = Total minutes broadcast (6 A.M.–Midnight during the composite week)
e = Disturbance factor (assumed normally distributed with mean of zero and variance is σ^2)

In evaluating the model, the object was to test the relationship between X_4 (newspaper joint ownership) and P (minutes of program category) for each of the eighteen program categories.[2] The null hypothesis for each of the eighteen program categories was that the newspaper joint ownership coefficient (b_4) is not significantly different from zero.[3]

Data

Data on the observations included in the study were drawn from a number of sources. Table 2 shows the source of data for each variable in the study.

In general, the analysis included observations from all network affiliates. Independent stations were not included because the number of co-located independent station-newspaper combinations was very small, and their programing patterns were different from affiliated stations. In addition, three other classes of stations were excluded: (1) stations outside the continental U.S., (2) satellite stations, and (3) stations in the top seven markets.[4] The stations in the top seven markets were omitted because previous work by the staff indicated that the stations in these markets behave somewhat differently than stations in other markets and would weigh the results because of their large size. In any case, there were only two newspaper-TV co-located combinations in the top seven markets.

Findings

Table 3 shows the regression results for each of the eighteen programming categories. This table reports the coefficient (b), standard error of the coefficient (S_b) and t statistic for each of the eight independent variables across all eighteen program categories.

Hypothesis tests on the coefficient b_4 indicate that the quantitative effect of newspaper ownership on public service and local programing is not significantly different than zero in all but these three categories:

1. 6 A.M.–Midnight, local sources only, news, public affairs and "other" (ALNPO)
2. 6 A.M.–Midnight, local sources only, news (ALN)
3. 6 A.M.–Midnight, local sources only, all programing, including entertainment (ALNPOE)

Table 3 shows that all three of these coefficients are positive. Thus newspaper joint ownership tends to be associated with increased amounts of program time

[1] The effect of ABC affiliation is captured in the intercept term.
[2] It should be noted that the coefficients associated with the independent variables were not expected to remain constant across all programing categories. For example, the network terms were expected to be larger and more significant for categories that include all program sources than for categories that include local program sources only.
[3] Although the results show other significant relationships, this study was confined to the newspaper ownership factors.
[4] The top seven markets were defined according to 1972 ARB ADI TV households rank; New York, Chicago, Los Angeles, Philadelphia, San Francisco, Boston, and Detroit.

devoted to ALNPO, ALN, and ALNPOE. The amount of increase for each category is:

1. 6 A.M.–Midnight, local sources only, news, public affairs and "other"—55.74 minutes per week (9.0% over the mean of 614.76 minutes)
2. 6 A.M.–Midnight, local sources only, news—21.94 minutes per week (6.3% over the mean of 344.75 minutes)
3. 6 A.M.–Midnight, local sources only, all programing, including entertainment—94.78 minutes per week (12.5% over the mean of 757.10 minutes)

The conclusion is that television stations under joint ownership with a co-located newspaper quantitatively perform at least as well as other stations in the areas covered by this study; however these jointly owned stations broadcast significantly more minutes than other stations in several categories of local programing, other important factors being equal.

TABLE 1—PROGRAM CATEGORIES AND DAY PARTS

6 A.M.–Midnight, All Sources:
1. News, Public Affairs, and "Other".
2. News and Public Affairs.
3. News.
4. Public Affairs.

6 A.M.–Midnight, Local Sources Only:
1. News, Public Affairs, "Other", and Entertainment.
2. News, Public Affairs, and "Other".
3. News and Public Affairs.
4. News.
5. Public Affairs.

Prime Time (6 P.M.–11 P.M.), All Sources:
1. News, Public Affairs, and "Other".
2. News and Public Affairs.
3. News.
4. Public Affairs.

Prime time (6 P.M.–11 P.M.), Local Sources Only:
1. News, Public Affairs, "Other", and Entertainment.
2. News, Public Affairs, and "Other".
3. News and Public Affairs.
4. News.
5. Public Affairs.

TABLE 2—PROGRAM CATEGORIES AND DAY PARTS

6 A.M.–Midnight, All Sources:	
1. News, Public Affairs, and "Other"	ANPO
2. News and Public Affairs	ANP
3. News	AN
4. Public Affairs	AP
6 A.M.–Midnight, Local Sources Only:	
1. News, Public Affairs, "Other", and Entertainment	ALNPOE
2. News, Public Affairs, and "Other"	ALNPO
3. News and Public Affairs	ALNP
4. News	ALN
5. Public Affairs	ALP
Prime Time (6 P.M.–11 P.M.), All Sources:	
1. News, Public Affairs, and "Other"	PNPO
2. News and Public Affairs	PNP
3. News	PN
4. Public Affairs	PP
Prime time (6 P.M.–11 P.M.), Local Sources Only:	
1. News, Public Affairs, "Other", and Entertainment	PLNPOE
2. News, Public Affairs, and "Other"	PLNPO
3. News and Public Affairs	PLNP
4. News	PLN
5. Public Affairs	PLP

NOTE.—Codes in right column are abbreviations used in table 3.

TABLE 3

DEP. VARS. IND. VARS.	ALNPO $\bar{y}$=614.76 R^2=.369	ALNP $\bar{y}$=462.41 R^2=.424	ALN $\bar{y}$=344.75 R^2=.477	ALP $\bar{y}$=117.65 R^2=.130	PLNPO $\bar{y}$=156.63 R^2=.264	PLNP $\bar{y}$=148.98 R^2=.292
Channel type: (VHF=1, dummy variable):						
B	59.78	53.07	54.30	−1.23	9.12	12.61
S	25.32	16.87	10.97	11.27	8.07	7.53
t	*2.36	**3.15	**4.95	−.11	1.13	1.68
CBS:						
B	−25.87	11.32	8.24	3.09	39.34	38.48
S	24.47	16.30	10.60	10.89	7.80	7.27
t	−1.06	.70	.78	.28	**5.05	**5.29
NBC:						
B	5.61	21.79	31.60	−9.80	51.47	46.00
S	23.81	15.86	10.31	10.59	7.59	7.08
t	.24	1.37	**3.06	−.93	**6.79	**6.50
Newspaper joint ownership:						
B	55.74	14.60	21.94	−7.34	2.73	4.40
S	25.85	17.22	11.20	11.50	8.24	7.68
t	*2.16	.85	*1.96	−.64	.33	.57
Group ownership:						
B	−23.15	−16.26	−7.54	−8.72	−5.71	−3.23
S	19.87	13.24	8.61	8.84	6.33	5.91
t	−1.17	−1.23	−.88	−.99	−.90	−.55
REY (XOOO) $\bar{X}$=2,359.49:						
B	.04072	.03633	.02342	.01291	.01162	.01187
S	.00490	.00326	.00212	.00218	.00156	.00146
t	**8.31	**11.13	**11.03	**5.92	**7.44	**8.15
Number of commercial stations $\bar{X}$=3.13:						
B	15.29	3.59	1.54	2.05	−1.48	−1.24
S	4.12	2.74	1.78	1.83	1.31	1.22
t	**3.71	1.31	.86	1.11	−1.13	−1.01
Total broadcast minutes:						
B	.15373	.09277	.06631	.02646	.01657	.01468
S	.02614	.01741	.01132	.01163	.00833	.00777
t	**5.88	**5.33	**5.86	*2.28	*1.99	1.89

	PLN $\bar{y}$=127.36 R^2=.267	PLP $\bar{y}$=21.62 R^2=.057	ALNPOE $\bar{y}$=757.10 R^2=.207	PLNPOE $\bar{y}$=196.09 R^2=.138	ANPO $\bar{y}$=1644.04 R^2=.464	ANP $\bar{y}$=995.65 R^2=.532
Channel type: (VHF=1, dummy variable):						
B	13.59	−.97	−30.51	−14.36	99.46	56.29
S	6.73	3.38	43.33	13.63	35.23	21.77
t	*2.02	−.29	−.70	−1.05	**2.82	**2.58
CBS:						
B	33.25	5.22	−65.60	28.62	344.97	227.50
S	6.51	3.26	41.88	13.18	34.05	21.04
t	**5.11	1.60	−1.57	*2.17	**10.13	**10.81
NBC:						
B	39.61	6.38	−21.06	53.67	185.74	241.22
S	6.33	5.17	40.74	12.82	33.13	20.47
t	**6.26	*2.01	−.52	**4.19	**5.61	**11.78
Newspaper joint ownership:						
B	6.33	−1.95	94.78	24.26	35.40	7.10
S	6.87	3.43	44.23	13.92	35.97	22.23
t	.92	−.57	*2.14	1.74	.98	.32
Group ownership:						
B	−3.36	N/S	−59.29	−18.46	−35.74	−16.12
S	5.29	----------	34.01	10.70	27.65	17.09
t	−.64	----------	−1.74	−1.73	−1.29	−.97
REY (XOOO) $\bar{X}$=2,359.49:						
B	.00909	.00279	.04924	.01226	.03341	.03219
S	.00310	.00064	.00839	.00264	.00632	.00421
t	**6.98	**4.34	**5.87	**4.64	**4.90	**7.64
Number of commercial stations $\bar{X}$=3.13:						
B	−.80	−.43	14.29	.66	12.23	2.15
S	1.10	.35	7.05	2.22	5.73	3.54
t	−.73	−.79	*2.03	.30	*2.13	.61
Total broadcast minutes:						
B	.01383	.00087	.23302	.03527	.28940	.17428
S	.00695	.00346	.04473	.01407	.03637	.02247
t	*1.99	.25	**5.21	*2.51	**7.96	**7.75

See footnotes at end of table.

TABLE 3—Continued

DEP. VARS. IND. VARS.	AN $\bar{y}$=670.46 R^2=.645	AP $\bar{y}$=325.19 R^2=.150	PNPO $\bar{y}$=413.34 R^2=.279	PNP $\bar{y}$=381.04 R^2=.360	PN $\bar{y}$=264.34 R^2=	PP $\bar{y}$=116.70 R^2=
Channel type: (VHF=1, dummy variable):						
B	61.61	−5.41	6.74	5.07	6.72	−1.65
S	14.55	14.52	11.82	10.27	8.34	6.04
t	**4.24	−.37	.57	.49	.81	−.27
CBS:						
B	225.29	2.21	82.63	82.04	70.80	11.24
S	14.06	14.04	11.43	9.92	8.06	5.83
t	**16.02	.16	**7.23	**8.27	**8.78	1.93
NBC:						
B	250.73	−18.51	−38.73	−46.78	67.01	−113.80
S	13.68	13.36	11.12	9.66	7.85	5.68
t	**18.99	−1.36	**−3.48	**−4.85	**8.54	**−20.25
Newspaper joint ownership:						
B	23.25	−16.15	6.16	12.78	5.63	7.15
S	14.85	14.82	12.07	10.48	8.52	6.16
t	1.57	−1.09	.51	1.22	.66	1.16
Group ownership:						
B	−13.27	−3.35	−8.19	−2.78	−1.14	−1.64
S	11.41	11.40	9.28	8.06	6.55	4.74
t	−1.62	−.29	−.88	−.35	−.18	−.35
REY (XOOO) $\bar{X}$=2,359.49:						
B	.01451	.01768	.01408	.01229	.00849	.00380
S	.00282	.00281	.00229	.00199	.00161	.00117
t	**5.15	**6.29	**6.15	**6.18	**5.26	**3.25
Number of commercial stations $\bar{X}$=3.13:						
B	2.54	−.39	−2.45	−2.27	−.16	−2.11
S	2.37	2.36	1.92	1.67	1.36	.98
t	1.07	−.17	−1.28	−1.36	−.12	**−2.15
Total broadcast minutes:						
B	.12758	.04670	−.02119	.00641	.01362	−.00721
S	.01502	.01499	.01221	.01060	.00861	.00623
t	**8.50	**3.12	−1.74	.61	1.58	−1.16

**Significant at the 1 percent level.
*Significant at the 5 percent level.
N/S not significant (the explanatory power of this variable was so low that the computer did not include it in the analysis).

See table 2 for key to abbreviations.

APPENDIX D

TV Station Monopolies—Divestiture Required

City, State:	*TV Call Letters*
Alabama: Anniston	WHMA
Georgia: Albany	WALB
Iowa: Mason City	KGLO
Mississippi: Meridian [1]	WTOK
New York: Watertown	WWNY
Texas: Texarkana	KTAL
West Virginia: Bluefield	WHIS

[1] WHTV, a satellite of Tupelo station WTWV, provides city-grade coverage but has no studio in Meridian.

APPENDIX E

AM and FM Station Monopolies—Divestiture Required

City, State	AM call letters	FM call letters
Arkansas: Hope	KXAR	
Illinois:		
Effingham	WCRA	WCRA-FM
Macomb	WKAI	WKAI-FM
Kansas: Arkansas City	KSOK	
Michigan: Owosso	WOAP	WOAP-FM
Nebraska: Norfolk	WJAG	WJAG-FM
Ohio: Findlay	WFIN	WFIN-FM
Pennsylvania: DuBois	WCED	WCED-FM
Wisconsin: Janesville	WCLO	WJVL

APPENDIX F

1. Section 73.35 of the Commission's Rules and Regulations is amended to read as follows:

§ 73.35 MULTIPLE OWNERSHIP.

(a) No license for a standard broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mV/m groundwave contours of the existing and proposed stations, computed in accordance with § 73.183 or § 73.186; or one or more television broadcast stations and the grant of such license will result in the predicted or measured 2 mV/m groundwave contour of the proposed station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of one of the television broadcast stations or will result in the Grade A contour(s) of the television broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the predicted or measured 2 mV/m contour, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published.

(b) No license for a standard broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven standard broadcast stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980 to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations which place(s) a city-grade signal over the community during daytime hours. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

NOTE 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2.—In applying the provisions of paragraphs (a) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

NOTE 3.—Except as provided in Note 4 of this section, in applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

NOTE 4.—In applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 U.S.C. section 80a–3 (commonly called a mutual fund), need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated.

NOTE 5.—In calculating the percentage of ownership of voting stock under the provisions of Note 4, if an investment company directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50 percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper as it owns of the outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company need not be considered under the 3-percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

NOTE 6.—In applying the provisions of paragraphs (a), (b) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts need be considered only if such bank directly or indirectly owns 5 percent or more of the outstanding voting stock: *Provided*, The bank files a disclaimer of intent to control the management or policies of the broadcast or newspaper corporation. Holdings by banks shall be aggregated if the bank has any right to determine how the stock will be voted.

NOTE 7.—In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stockholders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

NOTE 8.—Paragraph (a) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for increased power for Class IV stations; to applications for assignment of license or transfer of control filed in accordance with § 1.540(b) or § 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled standard broadcast stations and if no new encompassment of communities proscribed in paragraph (a) of this section as to commonly owned, operated, or controlled standard broadcast stations and television broadcast stations or daily newspapers would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of standard broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of standard broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a) of this section will not apply to any application by a party who directly or indirectly owns, operates or controls a UHF television broadcast station where grant of such application would result in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled standard broadcast station or would result in the entire community of license of such UHF station being encompassed by the 2 mV/m contour of such standard broadcast station. Such community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or controlled standard

broadcast station and daily newspaper fall within the encompassing proscription of paragraph (a) of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 9.—Paragraph (a) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade A contour of which completely encompasses the community of license of a commonly owned, operated, or controlled standard broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such standard broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled standard and "non-satellite" television stations may not be transferred or assigned to a single person, group, or entity except as provided in Note 8.

NOTE 10.—For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

2. Section 73.240 of the Commission's Rules and Regulations is amended to read as follows:

§ 73.240 MULTIPLE OWNERSHIP.

(a) (1) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more FM broadcast stations and the grant of such license will result in any overlap of the predicted 1 mV/m contours of the existing and proposed stations, computed in accordance with § 73.313; or one or more television broadcast stations and the grant of such license will result in the predicted 1 mV/m contour of the proposed station, computed in accordance with § 73.313, encompassing the entire community of license of one of the television broadcast stations or will result in the Grade A contour(s) of the television broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the predicted 1 mV/m contour, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published.

(2) No license for an FM broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other FM broadcast station if the grant of such license would result in a concentration of control of FM broadcasting in a manner inconsistent with the public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven FM broadcast stations.

(b) Paragraphs (a) and (c) of this section are not applicable to non-commercial educational FM stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations which place(s) a city-grade signal over

the community during daytime hours. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

NOTE 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2.—In applying the provisions of paragraphs (a)(1) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

NOTE 3.—Except as provided in Note 4 of this section, in applying the provisions of paragraph (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

NOTE 4.—In applying the provisions of paragraphs (a)(1) and (a)(2) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 U.S.C. section 80a–3 (commonly called a mutual fund), need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated.

NOTE 5.—In calculating the percentage of ownership of voting stock under the provisions of Note 4, if an investment company directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50 percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper, as it owns of the outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company need not be considered under the 3-percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

NOTE 6.—In applying the provisions of paragraphs (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts need be considered only if such bank directly or indirectly owns 5 percent or more of the outstanding voting stock: *Provided*, The bank files a disclaimer of intent to control the management or policies of the broadcast or newspaper corporation. Holdings by banks shall be aggregated if the bank has any right to determine how the stock will be voted.

NOTE 7.—In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stockholders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

NOTE 8.—Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for assignment of license or transfer of control filed in accordance with § 1.540(b) or § 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled FM broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled FM broadcast stations and television broadcast stations or daily newspapers would result. Said paragraph will

apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of FM broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of FM broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a)(1) of this section will not apply to any application by a party who directly or indirectly owns, operates or controls a UHF television broadcast station where grant of such application would result in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled FM broadcast station or would result in the entire community of license of such UHF station being encompassed by the 1 mV/m contour of such FM broadcast station. Such community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or controlled FM broadcast station and daily newspaper fall within the encompassing proscription of subparagraph (a)(1) of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 9.—Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade A contour of which completely encompasses the community of license of a commonly owned, operated or controlled FM broadcast station, or the community of license which is completely encompassed by the 1 mV/m contour of such a FM broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled FM and "non-satellite" television stations may not be transferred or assigned to a single person, group, or entity except as provided in Note 8.

NOTE 10.—For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

3. Section 73.636 of the Commission's Rules and Regulations is amended to read as follows:

§ 73.636 MULTIPLE OWNERSHIP

(a)(1) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations, computed in accordance with § 73.684; or one or more standard broadcast stations and the grant of such license will result in the Grade A contour of the proposed station, computed in accordance with § 73.684, encompassing the entire community of license of one of the standard broadcast stations, or will result in the predicted or measured 2 mV/m ground-wave contour(s) of the standard broadcast station(s), computed in accordance with § 73.188, or § 73.186, encompassing the entire community of license of the proposed station, or one or more FM broadcast stations and the grant of such license will result in the Grade A contour of the proposed station,

computed in accordance with § 73.684, encompassing the entire community of license of one of the FM broadcast stations, or will result in the predicted 1 mV/m contour(s) of the FM broadcast station(s), computed in accordance with § 73.313, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the Grade A contour, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(2) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band.

(b) Paragraphs (a) and (c) of this section are not applicable to noncommercial educational television stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial television station which places a city-grade signal over the community. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980.

NOTE 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2.—In applying the provisions of paragraphs (a)(1) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate daily newspapers represented by ownership of voting stock of such corporations will be considered.

NOTE 3.—Except as provided in Note 4 of this section, in applying the provisions of paragraphs (a)(1), (a)(2) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

NOTE 4.—In applying the provisions of paragraphs (a)(1), (a)(2) and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, an investment company as defined in 15 U.S.C. section 80a-3 (commonly called a mutual fund), need be considered only if it directly or indirectly owns 3 percent or more of the outstanding voting stock or if officers or directors of the corporation are representatives of the investment company. Holdings by investment companies under common management shall be aggregated.

NOTE 5.—In calculating the percentage of ownership of voting stock under the provisions of Note 4, if an investment company directly or indirectly owns voting stock in a company which in turn directly or indirectly owns 50 percent or more of the voting stock of a corporate broadcast licensee or corporate daily newspaper, the investment company shall be considered to own the same percentage of outstanding shares of the corporate broadcast station licensee or corporate daily newspaper as it owns of the outstanding voting shares of the company standing between it and the licensee corporation or corporate daily newspaper. If the intermediate company owns less than 50 percent of the voting stock of a corporate broadcast station licensee or corporate daily newspaper, the holding of the investment company need not be considered under the 3-percent rule, but, officers or directors of the licensee corporation or of the corporate daily newspaper who are representatives of the intermediate company shall be deemed to be representatives of the investment company.

NOTE 6.—In applying the provisions of paragraphs (a)(1), (a)(2), and (c) of this section to the stockholders of a corporation which has more than 50 voting stockholders, a bank holding stock through its trust department in trust accounts need be considered only if such bank directly or indirectly owns 5 percent or more of the outstanding voting stock: *Provided*, The bank files a disclaimer of intent to control the management or policies of the broadcast or newspaper corporation. Holdings by banks shall be aggregated if the bank has any right to determine how the stock will be voted.

NOTE 7.—In cases where record and beneficial ownership of voting stock of a corporate broadcast station licensee or corporate daily newspaper which has more than 50 voting stock holders are not identical, e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street name for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, the party having the right to determine how the stock will be voted will be considered to own it for the purposes of these rules.

NOTE 8.—Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for assignment of license or transfer of control filed in accordance with § 1.540(b) or § 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled television broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled television broadcast stations and standard or FM broadcast stations or daily newspapers would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of television broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of television broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a)(1) of this section will not apply to major changes in UHF television broadcast stations authorized as of September 30, 1964, which will result in Grade B overlap with another television broadcast station that was commonly owned, operated, or controlled as of September 30, 1964; or to any application concerning a UHF television broadcast station which would result in the Grade A contour of the UHF station encompassing the entire community of license of a commonly owned, operated, or controlled standard or FM broadcast station or which would result in the entire community of license of such UHF station being encompassed by the 2 mV/m or 1 mV/m contours of such standard or FM broadcast stations, respectively. Such UHF overlap or community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or controlled television broadcast station and daily newspaper fall within the encompassing proscription of subparagraph (a)(1) of this section, the station may not be assigned to a single person, group, or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 9.—Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade B

contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated or controlled daily newspaper or the community of license of a commonly owned, operated or controlled standard or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such a standard broadcast station or the 1 mV/m contour of such an FM station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled "non-satellite" television stations with Grade B overlap or such commonly owned operated or controlled non-satellite television stations and standard or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 8. Nor shall any application for assignment or transfer concerning such non-satellite stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated or controlled newspaper is proposed to be transferred, except as provided in Note 8.

NOTE 10.—For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

APPENDIX G

SUMMARY OF ACTIONS TAKEN

I. PREVIOUS RULES CONTINUED IN EFFECT

(a) *TV-radio combinations.* No divestiture of existing combinations is required. The present rules governing such combinations which were adopted in an earlier phase of this proceeding remain in effect. This means that a licensee of a VHF television station may not build or acquire a radio station(s) (AM, FM, or AM–FM) in the same market; and that the licensee of an AM station, an FM station, or an AM–FM combination may not build or acquire a VHF station in the same market. Although existing combinations are not required to divest, if the owner of a VHF-radio combination sells, he must sell the TV and the radio station(s) to different parties. Applications involving UHF TV stations and radio stations are handled on a case-by-case basis. VHF television stations and AM stations are considered to be in the same market if the Grade A contour of the TV station completely encompasses the community of license of the AM station, or if the 2 mV/m contour of the AM station completely encompasses the community of license of the TV station. A similar market concept holds for FM stations and TV stations except that the critical contour for the FM station is 1 mV/m.

(b) *AM–FM combinations.* Existing rules governing such combinations continue in effect. No divestiture is required. This means that the licensee of an AM station may build or acquire an FM station in the same market and vice versa. Moreover, such a combination may be sold to a single party. The matter of whether the present rules governing duplication of programming by AM–FM combinations should be amended will be pursued in pending Docket No. 20016 (39 Fed. Reg. 14228 (1974)).

II. NEW RULES ADOPTED

(a) *Radio-newspaper combinations.* Divestiture is required by January 1, 1980, if the only daily newspaper of general circulation published in a community and the only radio station(s) placing a city-grade signal over the entire community in daytime hours are under common ownership. The owner of such a newspaper-AM–FM combination may satisfy the divestiture requirement by selling the newspaper, the AM–FM, the AM, or the FM. Waivers will be granted on a proper showing. The formation of new radio-newspaper combinations in the same market is barred. They are considered to be in the same market if the 2 mV/m

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contour of an AM station or the 1 mV/m contour of an FM station completely encompasses the community in which the newspaper is published. If an existing radio station licensee acquires a daily newspaper in the same market, he is given until the date of expiration of license of the radio station, or one year, whichever is longer, in which to divest of one of the two properties. Newspaper-radio combinations which are in the same market but which do not fall within the divestiture requirement previously mentioned need not divest. However, if such combinations are sold the newspaper and the radio station(s) must be sold to different parties.

(b) *TV-newspaper combinations.* Divestiture is required by January 1, 1980, if the only daily newspaper of general circulation published in a community and the only TV station placing a city-grade signal over the entire community are under common ownership. The divestiture requirement may be satisfied by selling either the newspaper or the TV station. The divestiture requirement applies whether the TV station is UHF or VHF. Waivers will be granted on a proper showing. The formation of new TV-newspaper combinations in the same market is barred. (The proscription against formation of new TV-newspaper combinations applies whether the TV station is UHF or VHF.) They are considered to be in the same market if the Grade A contour of the TV station completely encompasses the community in which the newspaper is published. If an existing TV licensee acquires a daily newspaper in the same market, he is given until the date of expiration of the TV license, or one year, whichever is longer, in which to divest. Newspaper-TV combinations which are in the same market but which do not fall within the divestiture requirement previously mentioned need not divest. However, if such combinations are sold the newspaper and the TV station must be sold to different parties.

III. POLICY AS TO CROSS-INTERESTS IN NEWSPAPER-BROADCAST COMBINATIONS

The policy heretofore applied to cross-interests in broadcast stations serving substantially the same area will be applied to newspaper-broadcast combinations falling within the ambit of the newly adopted rules.

Concurring Statement of Commissioner Robert E. Lee

I have previously articulated my views with respect to cross-ownership of newspaper and TV—a breakdown of these combinations would, in my opinion, result in the demise of many newspapers throughout the United States. I recall with sadness the death of the *Boston Herald* newspaper after the Commission divested its wholly owned subsidiary, TV station WHDH.

However, I am concurring in the Commission's decision today because the rules are primarily prospective in nature and because, based on my prior experience, the Commission should give little weight to this issue in a comparative hearing against an existing TV licensee. As the Commission stated (at paragraph 129) any overall restructuring of the industry it deemed necessary has been done in this docket. To permit restructuring at renewal time would permit to be done indirectly what the Commission has refused to do directly. In addition, I will have the opportunity to analyze and evaluate future waiver requests of the Commission's rules on a case-by-case basis.

Now, with respect to AM/FM combinations, I believe it is economically premature to break them up at this point in time. Over these many years, the Commission has encouraged these combinations in order to support and promote FM development. The day may well come when AM and FM licensees can economically survive as separate entities. At that point, I, of course, will review my present position.

Concurring Statement of Commissioner Charlotte T. Reid

(Re Docket 18110)

Today the Commission makes a far reaching decision in its Telecommunications Policy. A decision requiring divestiture of cross-owned newspaper-television and radio stations. I have reluctantly concurred with the majority's decision to require divestiture of sixteen (16) such combinations by January 1, 1980, because of what I feel to have been a long history of service by many of these newspaper/broadcast combinations. Many of these could not have existed except for cross-ownership and I find it somewhat difficult to require such drastic action. However, it does appear that these sixteen (16) are exceptional cases and therefore distinguishable from other situations. Additionally, the affected parties still have the opportunity to seek waivers of our divestiture requirement.

I am certain that this will not be the last that we hear of this issue, either before the Commission or in the Courts.

Statement of Commissioner Benjamin L. Hooks Concurring in Part; Dissenting in Part

(In Re Multiple Ownership of Broadcast Stations—Docket 18110)

The litigious history of the issue of newspaper/broadcast cross-ownership outlined in the first twenty-three paragraphs of the majority opinion, the mamouth record amassed in this Docket, and the Commission's continuing antipathy toward media concentrations as well as its espoused penchant for diversification bear tangible witness to the complexity of this matter.

My own considerations have been fraught with attempts to apply generally accepted wisdoms to the problem. In so doing, I have been frustrated because, when applied to the question of newspaper/broadcast cross-ownership, many of these "wisdoms" conflict and appear to dictate opposite results.

For example, the maxim that "two heads are better than one" can be applied to the Supreme Court's logic in attempting to achieve "the widest possible dissemination of information from diverse and antagonistic sources". *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). Equally. I accord with the Commission's policy of promoting diversification of mass communications as "a factor of primary significance since . . . it constitutes a primary objective in the licensing scheme." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). We should, I believe, continually endeavor to encourage a proliferation of information and entertainment sources as necessary for the enrichment and enlightment of a pluralistic society with broadly diffuse interests. On the cross-ownership question in particular, there is the vigorous contention of Professor Stephen Barnett of the University of California, Berkeley, Law School that "there is a considerable amount of concrete evidence of harm from crossownership— consisting mainly of examples found in a variety of published,

reliable sources—which in its aggregate demonstrates not only substantial and widespread harm but a clear tendency to produce it." [1] Professor Barnett's position is supported, in the main, by many other parties to this proceeding including the Department of Justice.

Conversely, as I contemplate the superior performance of many newspaper-owned stations (*see*, Dissenting Statement of Commissioner Nicholas Johnson, "Broadcasting in America: The Performance of Network Affiliates in the Top 50 Markets", 42 FCC 2d 3 (1973) [2]) and speculate on the performance of some unknown successor, my conditioned response yields "a bird in the hand is worth two in the bush" philosophy. Opponents ask: Why require divestiture for its own sake of a superior broadcaster, with experience, background and resources, for an unknown licensee whose operation may be inferior? Can we afford, through wide-scale divestiture, to experiment with a dogmatic diversity formula; and, after the churning has ceased, who will profit—the new owners or the public? The *Rand studies*, note 1, *supra*, suggest that newspaper ownership of stations has no effect, good or bad, whatsoever.

In the clash of these opposing pressures, I have sought the views of the judiciary which has weighed these elements before. The clearest and most fundamental precept which the Commission must heed is ". . . there is nothing in the Act [Communications Act of 1934, as amended. 47 U.S.C. 151, et seq.] which either prevents or prejudices the right of a newspaper, as such, to apply for and receive a broadcast license." *Stahlman* v. *FCC*, 75 U.S. App. D.C. 176, 126 F. 2d, 124, 127 (1949). *Stahlman*, citing *Tri-State Broadcasting Co.* v. *FCC*, 68 U.S. App. D.C. 292, 96 F. 2d 564 (1938) went on about the Act to say: "It does not embrace and should not be extended by implication to embrace a ban on newspapers as such, for if that is the case, it would follow that the power to exclude exists as to schools and churches; . . . Hence, it is that in the present state of the law that a newspaper owner who is also the owner of a broadcast station may very well say to whomever challenges this dual right: 'Who are thou that judgest another man's servant. To his own master he standeth or falleth.'" 75 U.S. App. D.C. at 179–80, 126 F. 2d at 127–28. Overwhelmingly, the attitude of the courts towards bare cross-ownership has been *nehil nequam est praesumendum* (nothing wicked is to be presumed) [3]. But,

[1] S. R. Barnett, "Cross-Ownership of Mass Media in the Same City. A Report to the John and Mary R. Markle Foundation. *A Critique of, and Supplement to, the Prospective Reports of the Rand Corporation*" (September 23, 1974), at preface. In his report, Professor Barnett takes exception to two Rand Corporation studies (W. S. Baer, H. Geller, J. Grundfest & K. B. Posner, "Concentration of Mass Media Ownership: Assessing the State of Current Knowledge" [R–1584–NSF]. September, 1974 and W. S. Baer, H. Geller & J. A. Grundfest, "Newspaper-Television Cross Ownership; Options for Federal Action", August, 1974) which tend to conclude that there is a "lack of concrete evidence of harm from cross-ownership." The *Rand studies*, it seems, have determined that "the evidence on the effects of cross-media ownership supports neither allegations of substantial harm nor those of public benefits from newspaper-television combinations." *Barnett Study*, at preface.

[2] Although a harsh critic of "media barons," former Commissioner Nicholas Johnson, in his overall performance ranking (i.e., news, commentary, public service announcements, employment of minorities and women) of TV stations in the top fifty markets, rated newspaper owner licensees quite respectably compared to other individual and group stations. *See* Table 17 of *Johnson's Study*, 42 FCC 2d at 77 *et seq.*

[3] *See, also, Massachusetts Bay Telecasters, Inc.* v. *FCC*, 104 U.S. App. D.C. 226, 261 F. 2d 55 (1958); *Pinellas Broadcasting Co.* v. *FCC*, 97 U.S. App. D.C., 236, 230 F. 2d 204, *cert. denied*, 350 U.S. 1007 (1956); *McClatchy Broadcasting Co.* v. *FCC*, 99 U.S. App. D.C., 195, 239 F. 2d 15, *cert. denied sub nom., Sacramento Telecasters, Inc.* v. *McClatchy Broadcasting Co.*, 353 U.S. 918 (1957). *But cf., Lorain Journal Co.* v. *U.S.*, 342 U.S. 143 (1951).

where cross-ownership is not "bare", where it is accompanied by other conditions such as a monopoly, cross-ownership can be a menace and affirmative action by the Commission is proper. *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959). The Commission has here required monopolies to divest and I agree with its decision in this respect. Where situations are extreme, we can and have acted (*see, e.g., Frontier Broadcasting Co.*, 21 FCC 2d 570 (1970)); and, should always do so where the circumstances present a spectre of specific abuse as in the *Mansfield Journal* case [4] or the great likelihood thereof. *See, Chronicle Broadcasting Co.*, 16 FCC 2d 882, 17 FCC 2d 245, *reconsideration denied*, 29 FCC 2d 903 (1969)).

Consequently, I am in favor of divestiture as a means of attaining necessary diversification because, as I have indicated, my philosophy favors the heterogeneity of voices that diversity should bring. That is the uniqueness and strength of this country. In my mind, then, the question is not one of divestiture, *per se*, but how that divestiture is accomplished and what conditions other than monopoly warrant *immediate* divestiture. Balancing inputs, I must concur with the majority's decision to the extent that it emphasizes a prospective means of attaining diversification rather than the harsh and unpredictable solution of divestments of an unprecedented scale. This Commission processed last calendar year 1,129 assignment and transfer applications out of some 8,600 existing stations in this country. Patently, there is flux and change in media ownership and the attritional process, governed by our future prohibitions, can provide a great deal of the desired diversification in a more orderly and equitable fashion than a wholesale upheaval. Nothing I have observed in this record or heard at oral argument warrants indiscriminate action. To mandate immediate divestiture in the less extreme situations, under the presently depressed economic conditions, would create undue hardships. I cannot find that justified when the same end may be accomplished, without the harsh and drastic dislocation, by our prospective policy.

Nevertheless, I cannot join my colleagues in limiting divestiture to pure monopoly instances while ignoring other situations where the problem could be as bad or worse. In confining divestiture to the thrust of dictum in the Supreme Court in *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959) (speaking on the point of absolute media monopolies), we have not paid proper heed to *Plains Radio Broadcasting Co.* v. *FCC*, 85 U.S. App. D.C. 48, 52, 175 F. 2d 359, 363 (1949) where the court held:

> It seems to us that in considering the public interest in the maintenance of competition in the dissemination of news, the Commission cannot select the fact that one applicant is the owner of the town's only newspaper and ignore the fact that the other applicant is directly related to several newspapers and radio stations in the same general section of the country (although not in the immediate community). *A concentration by a chain of stations over an area* would seem to us to be a factor in a comparative evaluation from the standpoint of competition in news dissemination. (Emphasis added).

[4] *Mansfield Journal Co.* v. *FCC*, 18 F. 2d 28 (D.C. Cir. 1950) (refusing to grant Construction Permit for AM–FM because of competitive abuse).

As some of my past dissents have stressed [5], the regional concentration problem begs for further scrutiny by this agency. Informational sway over entire geographic regions, though not unadulterated monopolies, can have a much more adverse impact than a purely local exclusivity as the *Plains Radio* case notes. I wish, therefore, we had examined those situations more extensively in this Docket which is styled "multiple ownership of broadcast stations."

My principal dissent flows from our failure to use this proceeding in any way at all to deal with the question of minority ownership. The courts have told us, in *Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 447 F. 2d 1201 (1971) and more recently in *TV 9, Inc.*, v. *FCC*, —— U.S. App. D.C., ——, 495 F. 2d 929 (1973), *cert. denied*, —— U.S. ——, 95 S. Ct. 245 (1974), that the Commission must take steps to integrate minorities into broadcast ownership. While I am not naive enough to believe that even categorical divestiture, where swaps and stock transfers were the most likely result, would dramatically increase minority ownership, there are illustrations of locations where compulsory divestiture could have led to minority ownership. As stated at the July 24, 1974 Oral Argument by Kujaatele Kweli (National Black Media Coalition): "Guidelines must be developed which not only require divestiture, but which also increase diversity; otherwise new rules might only reorganize vested interests. Any new ruling must be conceived in the spirit of creating new opportunities for the previously deprived." Tr. at 153. Mr. Kweli recognizes, as do I, that naked divestiture of cross-owned stations, *simpliciter*, is unlikely to improve the minority position in broadcasting. In that connection, I believe the law allows us to facilitate such minority acquisitions in cases where divestiture is required by tailoring the qualifications for assignees of divested stations to stress minority ownership. Just as we now have minimum requirements for all licensees (*i.e.*, legal, technical qualifications, financial and character qualifications), we could add a substantial minority ownership qualification without contravening Section 310 of the Communications Act. Section 310 merely prohibits us from considering the "disposal of the permit or license to a person other than [that] proposed" by the licensee. 47 U.S.C. § 310(b). It does not bar us from adopting general qualifications for all assignees or transferees; only from considering other parties not selected by the licensee who *first* meet our specified criteria. A more complete discussion of this concept is stated in a pleading in this Docket filed by Citizens Communications Center on behalf of the National Black Media Coalition (*Letter to Chairman Richard Wiley*, September 9, 1974). While I do not here subscribe to all of the proposals set forth therein, I believe the Commission should have devoted more attention to the proposal and dissent from its neglect to, at least, offer a meaningful alternative to accomplish some minority ownership of the divested properties.

Finally, I am not in concert with the majority insofar as our document does not specify the separation of operations between those

[5] *E.g., In Re: WEMJ, Laconia, New Hampshire.* (FCC Report No. 12757, No. 14, 1974).

newspaper/broadcasters untouched by our policy announced herein. I associate myself, therefore, with the views of Commissioner Quello on this point set forth in his concurring statement. More specifically, I am in favor of the program proferred by Marcus Cohn, Esq., embodied in a letter of July 26, 1974, to the Broadcast Bureau which specifies as follows:

(1) Separate sales staffs; competitive solicitation of all advertisers; (2) No combination or interrelationship of advertising rates; (3) Separate editorial and reportorial staffs; (4) No discriminatory policies or advertising rates to media competitiors; (5) Cross-ownership licensing not be permitted, unless their related newspaper—(a) carries fair program listing of TV stations; (b) accepts, on a nondiscriminating basis, advertising from all broadcasting stations; and (c) licensee and newspaper has not discriminatory policy against advertisers who use competitive media.

Inasmuch as we are not mandating divestiture of all co-located media, and in view of the abuses alleged by Professor Barnett, the National Black Media Coalition, and others, we should have taken the course recommended by Mr. Cohn to assure that the asserted wrongdoing does not recur.

Statement of Commissioner James H. Quello

(Docket No. 18110)

While I am in substantial agreement with the philosophy as well as the result of this Second Report and Order, and have voted to support it, I question whether it goes far enough in one important respect. The operational separation of commonly owned newspaper-television and newspaper-radio combinations is, in my opinion, a vital element in assuring the Commission's long-held policy of diversity of voices and equitable business competition without forcing the harsh remedy of requiring general divestiture. The Commission's views on this issue are expressed in paragraph 132 of this document and I subscribe to the language in that paragraph. However, I firmly believe that this view should be expressed as Commission policy, at the very least, and as a rule if First Amendment considerations permit it.

My own view is that, absent affirmative effort to assure operational separation on the part of "combination" licensees, the Commission must exercise extreme vigilance on a case-by-case basis and, should there be evidence of widespread abuse, re-visit this entire matter.

Concurring Statement of Commissioner Abbott Washburn

(On Newspaper-Broadcasting Cross-Ownership Decision—January 28, 1975)

I have serious reservations about one facet of the decision in this proceeding, namely, the divestiture requirement involving newspaper-radio combinations in nine small markets. In my judgment none of these situations amounts to an undue concentration of local "opinion power" akin to the newspaper-television monopoly cross-ownerships. But my chief concern stems from the possible economic disruption which our action may inflict on the small communities involved, par-

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ticularly on those seven with populations under 20,000. I hope, therefore, that our waiver policy in these situations will take careful note of the possible harm to a community that could result from the forcing of a small daily newspaper out of business, or from the forcing of a small daily newspaper to become a weekly newspaper, and from the breaking up of an AM–FM radio combination where the FM is dependent upon the AM financially and/or provides the only local nighttime service. In my view we ought, also, to give special consideration where the Commission's allocation rules prohibit another local radio station from coming into existence in these communities.

STATEMENT OF COMMISSIONER CLEN O. ROBINSON CONCURRING IN PART AND DISSENTING IN PART

The FCC does have a responsibility to promote diversification of ownership and competition among communications media, as the Commission recognizes by today's Report and Order. My colleagues and I part company not over whether that responsibility exists, but over its scope and its implementation. As a matter of practical effect the Commission's decision is essentially limited to a few cases of literal monoply, inasmuch as those are the only cases in which it is willing to require divestiture. Although future cross ownerships are banned in all markets, I believe a prospective ban is of little significance.

My version of what best serves the public interest would forbid, and require the divestiture of, commonly owned media (either newspaper or station could, of course, be divested) in all heavily concentrated markets, which are not confined to those in which the co-owned media constitute a literal monopoly. I would apply the same standard of undue concentration for divestiture as for a ban. For both I would apply essentially the standards developed in antitrust law—which, *conservatively interpreted*, would require divestiture in cases where the station and newspaper together controlled at least 30 percent of their respective markets. I would acknowledge the possibility of waivers in extraordinary cases, but I would emphasize that such waivers would be granted only on a most compelling showing of special considerations. With respect to radio-newspaper ownerships, I am less concerned about the dangers of concentration, but I would adopt the same standard of concentration as in the case of television-newspaper cross ownerships. I would deal in the same way with aural-television station combinations, which are at least still nominally before us in this proceeding.[1] Because my pre-eminent concern is with the newspaper-television cross ownerships and because the same basic policy considerations are, I believe, generally applicable to the other combinations, I shall focus principally on the newspaper-television combinations.

[1] The 1970 rules did not, of course, require divestiture of aural-television combinations but our Further Notice of Proposed Rule Making; 22 F.C.C. 2d 339 (1970) did leave open the possibility of ordering divestiture. It should be noted that AM–FM combinations are also, nominally, before us even though the original ban on such combinations was modified. See *Multiple Ownership Rule*, 22 FCC 2d 309 (1970). In its 1974 Memorandum Opinion and Order setting oral argument in Docket 20018, 39 Fed. Reg. 9551 (March 12, 1974) the Commission indicated, however, that it would consider, as an alternative to an AM–FM ownership ban, tightening our AM–FM nonduplication rules. For the present time I am content with that alternative, without prejudice to the possibility of revisiting this issue at an appropriate time in the future.

I. COMPETITION AS A COMMUNICATIONS POLICY

The majority ably expounds the general policy ground for our concern. While I concur in their general exposition I wish to add a few observations of my own.

It is not up to the FCC, of course, to enforce the antitrust laws as such: our mandate is the broader one of enforcing the public interest, convenience and necessity. *United States v. RCA*, 358 U.S. 334 (1959). Clearly, public interest, convenience and necessity includes concerns other than diversification.[2] Just as clearly, as the majority here states, diversity and related competitive concerns bear heavily on the public interest and must be considered in connection with its ascertainment.[3] Such matters in a particular situation may even prove dispositive. *United States v. RCA*, 358 U.S. at 351–52. Our own decisions have reiterated these same principles. In fact, I had supposed this statement of principle too well established to require further statement here, but in light of arguments by the NAB and ANPA (among others) to the contrary, apparently that assumption was incorrect. Their arguments are several.

A. The "No Competition for Competition's Sake" Argument

Relying on *Hawaiian Telephone Co. v. FCC*, 498 F. 2d 771 (D.C. Cir. 1974), and *FCC v. RCA Communications Inc.*, 346 U.S. 86 (1953), both ANPA and NAB have argued that "competition for the sake of competition" is indefensible; and that, before we go about promoting competition, we must affirmatively find that the public interest will be served thereby. Reliance on both decisions is misplaced inasmuch as both dealt with common carrier regulation of so-called "natural monopolies." Where natural monopoly is concerned, the received wisdom has been that competition has a limited role and that there is therefore no general presumption in its favor.[4] However, in the broadcast field that is not the received wisdom. More important, it is not the law. See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 105–110 (1973); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

I acknowledge that if our deconcentration policy were premised solely on promoting competition in commercial advertising in local markets, we would have to give more studied thought to the argument raised by the NAB and ANPA. While I recognize that competition in advertising markets is an entirely proper aim of public policy, I also acknowledge that in radio and television advertising markets, competition is not an unalloyed benefit. A short digression into the economic

[2] *Cf., Carroll Broadcasting Co. v. FCC*, 258 F. 2d 440 (D.C. Cir. 1958) (competitive entry in broadcasting); *FCC v. RCA Communications Inc.*, 346 U.S. 86 (1953) (competitive entry of common carrier).

[3] *E.G., Joseph v. FCC*, 404 F. 2d 207 (D.C. Cir. 1968); *Clarksburg Publishing Co. v. FCC*, 225 F. 2d 511 (D.C. Cir. 1955); *Mansfield Journal Co. v. FCC*, 180 F. 2d 28 (D.C. Cir. 1950); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *NBC v. United States*, 319 U.S. 190, 222–24 (1942).

[4] This wisdom is not received by everyone; see, *e.g.*, Posner, *Natural Monopoly and Its Regulation*, 21 Stanf. L. Rev. 548 (1969); Demsetz, *Why Regulate Utilities*, 11 J. of Law & Econ. 55 (1963). The FCC too has in recent years rejected some of the conventional wisdom about the supposed incompatibility of competition and common carrier regulation, and has come increasingly to recognize the important role of competition even in closely regulated areas traditionally regarded as the sole province of natural monopolies. See, *e.g.*, *Specialized Common Carrier Services*, 29 FCC 2d 870 (1971); aff'd. —— F. 2d —— (9th Cir., Jan. 20, 1975); *Domestic Communications-Satellite Facilities*, 35 FCC 2d 844 (1972).

effects of concentration (or, conversely, competition) will illustrate the nature of the problem.

The standard economic rationale for market deconcentration derives from the hypothesis that concentrated markets provide the opportunity for sellers to restrict output and to raise the price of their goods or services.[5] As a result, resources migrate from these markets to other markets in which they contribute less to the common good. In short, concentration distorts efficient resource allocation. See, generally, F. Scherer, *Industrial Market Structure and Economic Performance*, *ch.* 17 (1970). Application of this theory to television advertising would lead one to expect a similar effect on local-market concentration upon advertising rates, and correspondingly on "proper" resource allocation. Though no conclusive result emerges from the comments filed in this proceeding,[6] we can assume for the sake of argument that there is a direct relationship between concentration, appropriately defined, and advertising rates.

The standard economic argument that attempts to connect competition and economic welfare through the price mechanism may not be sufficient to allow us to make policy judgments concerning television advertising.[7] If concentration in local advertising markets conveys monopoly power, this power would be reflected in the broadcaster's ability to restrict viewer hours of advertising messages in order to raise the price per viewer exposure. This effect could be accomplished either through a decision to offer fewer commercial interruptions in entertainment programming or to air programs with less mass appeal. The former reduction we might applaud. The latter we might deplore—unless it reflected the substitution of "public service" programming for more-popular syndicated or network fare. The broadcaster with monopoly power is surely freer—and might well be more inclined—to preempt a network motion picture in order to offer a detailed investigation of a local sewer scandal. Thus, market power may be consistent with our desire to stimulate the public-service responsibility of broadcasters. Indeed, if there were not *some* barriers to competition in local markets, I suppose we could not expect licensees to offer the nonremunerative programs which are part of their public service responsibility. See *Carroll Broadcasting Co. v. FCC*, 258 F. 2d 240 (D.C. Cir. 1958); *cf.*, Levin, *Federal Control of Entry in the Broadcasting Industry*, 5 J. Law & Econ. 49, 61 (1962). These benefits from the exercise of market power in broadcasting must be candidly acknowledged as possible partial offsets against the potentially greater economic efficiency in the allocation of resources which increased competition can be expected to stimulate.[8]

If the desirability of competition here turned simply on assigning values to the foregoing economic considerations and weighing the resulting numbers against one another, I might be hesitant to say that the public interest demanded stricter control of concentration. However, an additional consideration must be placed in the scales: competition is a means of enhancing the potential for diversity of news and opinions[9] available to viewers, readers or listeners. The weight of this consideration seems to me decisive on whether increased competition in the advertising market is worthwhile. The dangers which concentrations pose to diversity of opinion seem to me sufficiently real to require the conclusion that a reduction in cross ownership in concentrated local markets serves the public interest whatever conclusions are reached concerning the effect of concentration on advertising rates or whatever judgment is reached about the economic effects of competition generally.

In so concluding, I have noted the argument of the NAB (among others) that we do not really need any additional diversity in the marketplace for ideas, that, indeed, we already have more diversity than we can handle. That assertion, buttressed in part by some interesting but irrelevant ruminations about "information overloads" and the like,[10] seems to me a feeble sophistry. Whatever the merits of these generalizations about how much information human beings can handle, nothing in them suggests that it is not a proper goal of public policy to continue to ensure that the information which the public receives and can absorb comes from diverse, competitive sources.

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[5] A number of empirical studies have attempted to measure the relationship between concentration and profit margins; the findings differ. Of those studies finding a positive relationship between concentration and high profit margins, the pioneering study is Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936–1940*, 65 Q. J. Econ. 293 (1951). Later studies include, for example, Mann, *Seller Concentration, Barriers to Entry, and Rates of Return in Thirty Industries, 1950–1960*, 48 Rev. Econ. & Stat. 296 (1966); Collins and Preston, *Concentration and Price-Cost Margins in Food Manufacturing Industries*, 14 J. Ind. Econ. 226 (1966). The significance of these studies has been questioned, primarily on the ground that there has been no showing of a persistence of high rates of return in highly concentrated industries. It has been argued that the studies do not provide a basis for the recommendations of the 1968 White House Task Force on Antitrust Policy for a program to reduce concentration through divestiture. Brozen, *The Antitrust Task Force Deconcentration Recommendations*, 13 J. Law & Econ. 279 (1970). However, the studies, and the White House Task Force recommendations based in part on them have been defended by economist members of the Task Force, MacAvoy, McKie and Preston, *High and Stable Concentration Levels, Profitability, and Public Policy: A Response*, 13 J. Law & Econ. 493 (1971). For more recent analyses, compare L. Weiss, *Concentration-Profits Relationship and Anti-Trust* (unpublished manuscript, 1973) (concentration-profits relationship exists) with H. Demsetz, *The Market Concentration Doctrine* (1973) (no such relationship exists).

[6] Compare J. Rosse, B. Owen and D. Grey, *Economic Issues in Joint Ownership of Newspaper and TV Media*, Stanford U. Research Center in Economic Growth, memo. No. 97 (June, 1970) (finding correlation between newspaper ownership and higher rates), with A. Lago and D. Osborne, *A Quantitative Analysis of the Price Effects of Joint Mass Communication Media Ownership* (NAB Study, March, 1971) (finding no correlation between newspaper ownership and rates). These two studies differ not only in their findings but in their statistical methodology. In the absence of fuller information about the models used, neither study can be accepted as definitive. One flaw of both studies, however, is their reliance on a measure of advertising price which is irrelevant to most television stations.

[7] The role of advertising in economic welfare generally is a controversial one on which there is a wide spectrum of divergent views. See C. Robinson and E. Gellhorn, *The Administrative Process*, 362–370 (1974), for a variety of critical perspectives on the virtues and vices of advertising. A useful general survey and analysis of the economic consequences is contained in F. Scherer, *Industrial Market Structure and Economic Performance*, ch. 14 (1970).

[8] This is not to say that the public service benefits received are, in fact, commensurate with their economic costs—a matter on which there is at least ground for doubt. It is also not to say that the internal subsidy is the only or the best method for obtaining public service benefits. See *e.g.*, Levin, *supra*, 5 J. Law & Econ. at 64–66.

[9] Inasmuch as we are only concerned here with competition between broadcast stations and newspapers and not with new competitive entry into broadcasting, no account is taken of the benefits of competition in providing a new source of programming generally. But speaking of the general benefits of competition in the industry, this obvious benefit should be noted.

[10] See NAB Comments, 29–36. Reliance is placed on a few paragraphs from A. Toffler, *Future Shock* (1970). Nothing in Toffler's observations—even granting their validity—suggests that diversification of mass-media control ought not to be of concern. Toffler merely holds that it is hard for someone to concentrate on one thing while being buffetted about in a hailstorm of facts. FCC Commissioners have special reason to know this is true. But it proves nothing in the realm of limiting diversity of speech.

B. The "Wrong Forum" Argument

A number of opponents have urged that our mandate is to enforce the Communications Act, not the antitrust laws: that two especially expert agencies of government—the FTC and the Department of Justice—are already attending to antitrust enforcement matters, and that our efforts in this regard, if not *ultra vires*, are at least supererogatory.

As always, we must be careful, as Justice Holmes once admonished, to think things rather than words. To be sure, the fact that we do not enforce the antitrust laws per se shows that we are not *required* to apply specific antitrust criteria in measuring the adequacy of competition in any given case, as if the relationship between competition and the public interest were apodictic. *Cf., McLean Trucking Co. v. United States*, 321 U.S. 67 (1944); *Seaboard Airline RR v. United States*, 382 U.S. 154 (1965). But we are hardly barred from concluding that competition is what the public interest requires, and sound public policy does, in my judgment, require such a conclusion. Making anything of substance turn on the distinction between "antitrust standards" on the one hand, and a more general "public interest" standard on the other, obscures issues with labels. In plain fact, we have long held that antitrust concerns are important components of the public interest and we are entitled, if not obliged, to consider them here. See, *e.g., United States v. RCA, supra;* see generally, Bennett, *Media Concentration and the FCC: Focusing With a Section Seven Lens*, 66 Nw. U. L. Rev. 159, 165 (1971).

C. The "Ad Hoc Approach" Argument

In opposition to divestiture, ownership interests in the communications industry argue that we need not and should not adopt an approach toward cross-ownership which relies on the creation of favorable market structures for competition. Rather, it is urged, we ought to confine our concern to cases where combined ownership has been shown to have produced actual abuses. Adequate machinery—such as the Fairness Doctrine—exists, it is submitted, to prevent the worst consequence of economic concentration from ever occurring; and other machinery, such as antitrust enforcement, is sufficient to deal with competitive misconduct as it moves from potentiality to actuality. Furthermore, we have (it is urged) power to control actual abuses by promulgating rules of good practice or fair dealing designed to ensure that the power of combination is not abused, and, where clear abuse is shown, to order divestiture ourselves.[11]

This argument partly claims that we do not have power to structure the communications industry to suit what we conceive the public interest to require, and it partly claims that the public interest does not, in fact require "structural" rather than "behavioral" rules concerning competition.[12] We may leave the claim concerning the merits

[11] *Frontier Broadcasting Co.*, 27 FCC 2d 486 (1971) is cited as precedent. After the Commission set a renewal application for hearing on an issue of concentration of control, the co-owned station was voluntarily sold.

[12] I use the terms "structural" and "behavioral" to denote two different approaches to the promotion of media diversity. The structural approach looks toward promoting a market conformation hospitable to diversity and competition: the behavioral approach relies on regulatory standards to enforce norms of competitive conduct, chiefly by prohibiting certain sorts of abuses that commonly accompany concentrated ownership and control.

to the next section, and concentrate here on the legal part of the assertion. It is so frail as barely to survive exposition; even the most zealous of the non-interventionists concedes that we have a proper role where a literal monopoly controls the news outlets in a given market. If our jurisdiction to use the divestiture remedy in monopoly markets is conceded, it is inconceivable that we should not have discretion to apply structural remedies where market power may be exercised by a less-than-monopoly concern. The question is: how much market power should be tolerated? Reasonable men may differ as to how that question should be answered, but it is difficult to gainsay that, in principle, the job of answering belongs to us.

Nothing about the divestiture remedy per se requires any exceptional comment or pause. In the related Clayton Act context, divestiture has long been viewed as a flexible and useful tool, not only to break up consummated monopolies, but merely to avert a trend toward an oligopolistic market structure. See, *e.g., United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Alcoa*, 377 U.S. 271 (1964); and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). Similar results have been reached where Section 1 of the Sherman Act was concerned. *United States v. First National Bank and Trust of Lexington*, 376 U.S. 665 (1964).

The foregoing discussion establishes that we have, at least in theory, a proper role in implementing so much of antitrust policy as seems to us consistent with our mandate to promote the use and utility of radio communications in the public interest. But it seems to me that our authority goes further. We may play that role by following a structural rather than a behavioral approach—that is, by prophylactic rather than reactive measures respecting competition and diversity.

Some commentators urge that we should not employ a structural approach—meaning divestiture in many cases—absent evidence of actual competitive abuses, that doing so would be arbitrary, discriminatory and unduly punishing. The proper response to this argument is to point to the structural rules which we already have—for example the duopoly rules, the multiple ownership rules, and the one-to-a-market rules, none of which are premised on any showing of an identifiable abuse. These rules, like the rule adopted by the Commission today, simply embody a judgment that concentration in relevant markets is an impediment to effective competition and diversity of viewpoints. I can discern little sense in the view that our means of enforcing desired norms of diversity must be chiefly by policing *ad libitum*. It is like insisting that the swamps not be drained so long as the quinine holds out.

D. The First Amendment Argument

Finally, the First Amendment is invoked as a reason why we may not adopt structural diversification rules. According to this argument, the First Amendment would be offended by a rule that "discriminates" against the owners of newspapers—i.e., that prohibited to newspaper owners a right permitted to other orderly citizens—the right to be a Commission licensee.

The short answer to this submission is that it is not newspaper owners that are being aimed at—it is monopolies or oligopolies: and

these the First Amendment does not protect. Indeed, it may be argued that the First Amendment itself is against the creation and subsistence of such strong redoubts of economic and social power. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

II. PRUDENTIAL CONSIDERATIONS

The preceding discussion is meant to dispose of the legal or jurisdictional objections to our meddling in media cross-ownership. A number of additional arguments are addressed to our discretion rather than to our fundamental power. Several of these arguments deserve discussion before turning to considerations that suggest to me that the Commission's approach to cross-ownership is unnecessarily narrow.

A. The Fairness Doctrine

It is urged that oligopoly or monopoly in communications outlets, to the extent that they might seem to bottleneck the free flow of information to the public, need not be of concern to the Commission because the Fairness Doctrine will serve to assure that, in broadcast media at least, the public will receive reasonably balanced programming concerning controversial matters of public importance. It would be a serious mistake for us to rely on the Fairness Doctrine alone to serve the ends at which diversity aims.[13] What constitutes a controversial issue, what makes it public as distinct from private, or important as distinct from trivial, are concepts far too uncertainly anchored in consensus to be trusted to do the work of "a multitude of tongues." *Associated Press* v. *United States*, 52 F.Supp. 363, 372 (S.D. N.Y. 1943) (L. Hand, J.). We can rely on the Fairness Doctrine to keep a broadcast licensee in what it judges to be the mainstream of its community's mores, in a general, average way. But our apparent desire to encourage that result does not suggest, logically or as a practical matter, that we ought not to prefer that a community be exposed to as many such judgments as is feasible.

B. The "Newspapers Make Good Licensees" Argument

ANPA urges with great force that one of the best reasons on the merits for granting broadcast licenses to newspapers is simply that newspapers make superior licensees. They point to the track record of several newspaper-broadcasters to make their point. But their contention is beside the real point.[14] Deciding whether a licensee has

[13] Indeed, as the broadcasters frequently remind us, the constitutional contours of the Fairness Doctrine are by no means certain, see *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974), and may not even be fixed, see *National Broadcasting Co., Inc.* v. *FCC*, No. 73-2256, D.C. Circuit, Sept. 27, 1974, vacated, Dec. 13, 1974 (en banc). It is odd, to say the least, to hear from an industry that has often stated its dislike for (and active opposition to) the Fairness Doctrine that we may rely on that doctrine to ensure diversity.

[14] It is also inconsistent in some sense with the assurances that newspapers and TV stations are operated separately. If they are truly separate operations, then how would newspaper ownership nurture quality in television broadcasting? Wherein lies the special virtue of a newspaper interest that is totally separated from the operation of the station? Pressed during oral argument for an explanation of this seeming contradiction the typical response of media owners was to fall back on general statements about the responsibility of newspapers, their keen awareness of local community needs and interests, etc. This explanation leaves something to be desired. What one wants to know is not whether newspapers are good citizens but how their special virtues as citizens are translated into broadcast operations that are, supposedly, independent of any working relationship with the newspaper.

been "good" or "bad," as we all know, is at the best a delicate job, and one that invites invidious, possibly even illegal government action. In order to avoid the temptation to introduce our personal predilections as significant determinants of licensee evaluation, we automate the normative functions as far as is practical. That is the meaning and advantage of structural rather than direct behavioral controls on the markets. All agree that competition in the arena of ideas is a good thing; I also assume that common ownership tends to erode competitive zeal. All agree that diversity of viewpoints is desirable; I also assume that common ownership tends to create an identity of outlook that can lessen diversity.[15] Similar assumptions have always governed the Commission's past action in this area. Suppose someone proposed to buy two television stations in the same market, pledging that both stations would continue (as before) to operate with separate staffs, separate editorial policies and separate identity. Could the Commission allow such a double-acquisition without patently abusing its authority? I think not, and I see no basis for a different judgment here.[16]

If we do not automate the judgment concerning what constitutes a "good" licensee—if we leave it to clinical, case-by-case judgments—there is some superficial force to the assertion that newspapers make superior licensees since some newspaper-owned stations have a reputation for being among the best stations in the country. But everyone should appreciate how very subjective and impressionistic the evaluation of such "reputation" evidence is.[17] It invites, I repeat, invidious if not illegal government action, for there are simply no generally agreed-upon criteria that can be used to decide what constitutes a "good station." I do not think we can claim to have reliable, objective evidence that newspaper-owned stations are better than other stations.

The Commission, in passing, notes the results of a statistical study by our staff that found co-owned stations programmed more local news, and local non-entertainment programming, and more local programming generally, than independently-owned stations. (See Appendix C of the Commission's opinion.) On the other hand, similar studies by a leading economic scholar of communications (which have not been effectively rebutted) indicate no significant difference in news or public

[15] The fact that the stations and newspapers operate with separate staffs is largely irrelevant if both staffs are selected so as to share a common outlook, or if the staffs—recognising the fact of common ownership—come to act on the basis of shared interests.

[16] I do not mean to say that the foregoing hypothetical case settles whether there ought to be rules about separate ownership; but it does settle whether, once there are such rules, mere protestations and assurances concerning the propriety of waiving them ought to satisfy us.

[17] In fact, the argument is made, and supported with some more or less "soft" evidence (much of it in our own files), that many newspapers are far from the model licensees that they are made out to be. See Barnett, *Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary R. Markle Foundation* (mimeo 1974). The evidence on this score is certainly not so overwhelming as to indict newspaper licensees as a class, but neither is it so negligible that it could be altogether ignored on the question of licensee "goodness"—if we really wanted to consider such matters in fixing our policy of diversification.

affairs programming, and no significant difference in the character or diversity of other program types.[18]

Asking whether newspaper owners would provide more diversity among different program types is perhaps the wrong way to go about ascertaining whether such owners have a high "good quotient." We ought not to assume that the kind of "goodness" we really want in a station is measured simply by diversity among different program types, the relative percentage of situation comedies, news, public affairs and the like. On the other hand, it is about the only way we can get any kind of objective handle on program quality, without getting into the business of making subjective valuations of programming content, a course that, needless to say, raises grave First Amendment problems.

This constitutional backdrop illustrates the principal difficulty with the whole character of the defense offered in support of newspaper-owned stations. We are asked to make a determination that these are "better" stations, but in the nature of things the only way one can really determine that is to make the kind of qualitative judgments that both the First Amendment and sound public policy would seem to forbid.[19]

C. The Risk of Nonpersuasion

No discussion of the merits of newspaper cross-ownership or divestiture can be complete without coping with the question of who bears the risk of non-persuasion. Ordinarily, as ANPA strongly urges, proponents of a change in the status quo have the burden of coming forward with evidence. In this case, I submit that the burden lies the other way. As a corollary to our belief that a comprehensive, unconcentrated ownership structure is prima facie in the public interest, it is up to the media owners to establish public interest tradeoffs sufficient to outweigh the assumed bad effects of concentration. The Commission need not attempt a detailed showing to prove precisely the

[18] Levin, *The Policy on Joint Ownership of Newspapers and Television: Some Assumptions, Objectives and Effects* (April 1971). See also Levin's clarifying memorandum of December 1971, and supplementary comments, May 1974. As summarized in the last submission, Levin's statistical analysis found the following:

I. Newspaper ownership does not affect:
(a) The diversity of program types in the market.
(b) Profitability.
(c) Revenues.
(d) Time sales.
(e) Audience size.
(f) Amount of news.
(g) Amount of high-brow entertainment.
(h) Amount of low-brow entertainment.
(i) Amount of feature films.
(j) Amount of local programming.

II. Newspaper ownership has a very small positive effect on:
(a) The diversity of program types presented daily on the station ("vertical diversity") (i.e., less than one-tenth additional program type per day);
(b) Minutes of public affairs (plus 17 minutes per week).

However, these effects are much smaller than the effects of other variables.

III. In one-station VHF markets, newspaper ownership does not affect any of the above, except it has a small negative effect on:
(a) Amount of local programming (minus 135 minutes per week);
(b) Amount of non-network programming (minus 180 minutes per week).

[19] Even if we were to admit subjective judgments into consideration, it would have to be remembered that what we may deem to be high quality in newspaper ownership may reflect, not the fact that a newspaper owns the station, but other factors: the station may be "better" simply because of its network affiliation, or because it is in a major market with a large audience. This latter point bears special notice in view of the argument of combination owners, that co-owned stations and newspapers are managed and operated in *total* independence of each other.

vices of cross-ownership and each particular public interest benefit that may be expected to flow from divestiture. Once it is established that a given ownership structure is inadequately competitive—in other words, that it is concentrated to a degree that poses a significant possibility of uncompetitive behavior—the Commission's burden is at an end.[20] This allocation of burdens seems to me decisive of the basic question. I find nothing in the record to demonstrate that newspaper ownership of broadcast stations, in general, offers the public any distinctive benefits. Of course, in individual cases it may be that such a showing could be made. Such a showing—whether of unique public benefit or of extraordinary private hardship—could be handled with a waiver—a time-honored tradition of FCC rulemaking. Accordingly, we need not shy away from a general rule simply because its rigid application may create some public or private hardship. The remedies for such hardships are familiar and close at hand.

III. MEASURING CONCENTRATION

A. Market Definition: Product Market

There is no exact science to the definition of line of commerce, or product market, as the Merger Guidelines of the Department of Justice (see 1 CCH Trade Reg. Rep. para. 4430) make very clear:[21]

> The sales of any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily constitute a relevant product market, even though, from the standpoint of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of price, quality and use. On the other hand, the sales of two distinct products to a particular group of purchasers can also appropriately be grouped into a single market where the two products are reasonably interchangeable for that group in terms of price, quality and use. In this latter case, however, it may be necessary also to include in that market the sales of one or more other products which are equally interchangeable with the two products in terms of price, quality and use from the standpoint of that group of purchasers for whom the two products are equally interchangeable.

While a variety of subjective judgments are often required in determining whether products are substitutes and in drawing market boundaries, these judgments can be supplemented in most cases with empirical evidence. Do the prices of the goods appear to move together? Does an increase in the relative price of one good influence the demand for the others? Are the goods in fact interchangeable in

[20] In response to the submission of the Department of Justice that competition and diversity are presumed to benefit the public, the submission of one opponent—typical of the tenor if not the phraseology of most opponents, was that allocating the burdens so was tantamount to telling a homeowner that he must show why he should be permitted to retain his house. The analogy is arresting in that it illustrates how some broadcasters regard their licenses—as property. This view, to say no more of it, is simply at odds with our statute. To be sure, we do, as a practical matter, usually renew licenses indefinitely, a practice consistent enough to raise a certain informal equity in protecting investment and in rewarding service when and if it has been performed. But this informal equity should not be used to impede the erection of a framework within which that equity, and the expectations formed in reliance thereon, is constrained. Any contrary conclusion insulates the status quo from all competing claims of public interest as these may ripen in light of changing needs and changing perceptions of needs.

[21] A brief scan of the precedents likewise shows that the relevant criteria are far from concrete. Compare, for example, *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964) (glass and metal containers constitute single line of commerce); *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964) (copper and aluminum conductor are separate product lines). See generally, *Brown Shoe Company* v. *United States*, 370 U.S. 294 (1962).

terms of production or in consumers' consumption bundles? Unfortunately, this type of empirical evidence has not been assembled and analyzed in this proceeding.

In any event, it is important to distinguish between the two sets of "products" we consider here: (1) advertising and (2) the dissemination of news and opinions.

(1) The delineation of a product market for advertising is deceptively difficult. I believe that one must accept the notion that newspaper and television advertising are competitive services to some extent, but I must acknowledge the possibility that the cross elasticity of demand may not be large. For some products, they are obviously not good promotional substitutes while for others print may serve just as well as broadcast messages. I also concede that insofar as other forms of advertising are substitutes for print or broadcast messages, the advertising market includes other media which presumably offer some competition to newspapers and television stations. Having issued this caveat, however, I still stand by the conclusion that newspaper and broadcast advertising are sufficiently close substitutes to justify our regarding them, for purposes here, as the same "line of commerce."

(2) Delimiting the market for dissemination of news and opinion is equally problematical, but in this instance there are few empirical data to guide us. It is virtually impossible to determine the relative importance of various media upon local citizens' knowledge of contemporary affairs. While it may be that especially well informed citizens draw their information from a wide variety of sources—daily newspapers, magazines, weekly newspapers, television, radio, and various professional newsletters—as a practical matter, it seems to me unlikely that most citizens avail themselves of the full variety of sources available. Such evidence as we have corroborates the intuition that television, newspaper and radio are the dominant sources of information.[22] On this conclusion I believe we are amply justified in striving for diversification of control of these media within the same geographic market.

B. Geographic Market

The above considerations argue for quite different approaches to the demarcation of geographical boundaries in defining the relevant market. For advertising, the important question is whether a given medium competes for exposure to audience (readers, viewers, or listeners) for promoting a particular group of products or services. The media in effective competition with one another in this respect may not be alternatives for disseminating news and opinions concerning local or regional matters. For both product markets, a number of alternatives are before us. One, argued by the NAB and endorsed by most of the media interests, is the so-called Area of Dominant Influence (ADI), employed by advertisers to define markets for purposes of advertising sales. A second, suggested by the Justice Department and others, is the Standard Metropolitan Statistical Area (for markets outside officially designated SMSA's, presumably something like Urbanized Area could

[22] H. Litwin & W. Wroth, *The Effects of Common Ownership on Media Content and Influence* (1969).

be used). A third, which is suggested by some of our own prior precedents,[23] is the service contour of the co-owned station (Grade B, Grade A, or City Grade, or their radio counterparts, could be used—with widely divergent results). Each of these different approaches to market definition does have something to be said for and against it. But for present purposes the market area in which we are interested is not the area served by one or the other of the co-owned firms, but that area in which their service overlaps.[24]

For purposes of its prospective ban on newspaper-television cross-ownerships, the Commission implicitly [25] regards the Grade A service area of the co-owned television station as the relevant geographic market for purposes of banning newspaper-television (comparable service areas are drawn for radio-newspaper) ownerships.[26] Following the majority's approach of banning all (future) common ownerships within the Grade A contour of the station, the use of a Grade A contour standard actually imposes a stricter standard—for purposes of a prospective ban—than would be suitable under an approach which uses the market concept as a framework for measuring concentration. The majority, in other words, uses the television/radio contours as the criterion for deciding in what area co-ownership ought to be banned. My view is that, since concentration of control is the evil to be eliminated, engineering contours without more will not necessarily yield the information we presumably want, and ought not be depended upon to do so. It might be acceptable to use the Grade A television service contour (or its aural equivalent) to describe a geographic area in which concentration would be measured; but this approach, in my view, would artificially dilute the concentration figures. I believe it much more realistic to measure concentration with reference to the city or urban area (or perhaps in larger cities, the SMSA) in which the co-owned facilities exist. However, I would then ban *existing* as well as future ownerships in such of those markets in which there was an "undue concentration" according to criteria described below.

C. Competitive Foreclosure: Determining the Threshold

My greatest difficulty with the majority is not with its approach to market definitions, but with its determination of the tolerable level of

[23] The word "some" merits special emphasis for the Commission's precedent is far from clear and anything but consistent. The following is a short sample of recent decisions and criteria used as the principal determinant of market definition for the purpose of measuring concentration and diversity of media.

City of License-Frontier Broadcasting, 21 FCC 2d 570 (1970) (TV Renewal), *Gale Broadcasting Co.*, 15 P&F Radio Reg. 2d 337 (1969) (FM Sale).

City and Surrounding Area-Jonquil Broadcasting Co., 18 P&F Radio Reg. 2d 243 (1970) (AM Sale), *The Evening Star Broadcasting Co.*, 20 P&F Radio Reg. 2d 1311 (1971) and *Federation of Citizens Association-D.C.*, 17 P&F Radio Reg. 2d 1113 (1970) (TV Renewals).

Station Contour-Cumberland Gap Broadcasting Co., 24 FCC 2d 393 (1970) (FM CP), *KSOO-TV, Inc.*, 28 P&F Radio Reg. 2d 1271 (1973) (TV Sale).

[24] I stress this obvious point only because it seems to have been ignored by many of the advocates in this proceeding (most notably the NAB), who have argued in effect that the widest area served by the newspaper or station be used to measure competition and concentration.

[25] The point is somewhat obscured in the majority opinion. The Grade A contour is used to define "co-owned" rather than to measure concentration. Under my approach the "market" is defined for purposes of measuring the degree of concentration. Incidentally, it should be noted that, while only television-newspaper markets are dealt with here, I am concerned with basic concepts and the same concepts are applicable, *mutatis mutandis*, to aural-newspaper ownerships, and also television-aural combinations.

[26] For purpose of divestiture the majority adopts a much different approach, one which is not based on any concept of market definition but simply on a restrictive view of what constitutes impermissible concentration.

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concentration for existing combinations. The majority's acceptance of a high level of concentration for existing stations is particularly disturbing given the rather remote possibilities for new entry into television broadcasting.

The Justice Department urges upon us the adoption of the Clayton Act Section 7 standard of illegality which is based upon numerical market shares and the trend in concentration. The highwater mark in Section 7 litigation was reached in *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), where the Court found a violation in a merger of two grocery chains which, between them, embraced but 7.5 percent of the relevant market. The Court's standard depends not only on the alarm with which it views trends towards increasing concentration in an industry; it is also conditioned on the possibility that new entrants can invade a market which has become noncompetitive. In local television and newspaper markets, concentration is not likely to decline much further, but new entry is equally unlikely. New television stations are obviously not likely to spring up in concentrated markets unless the Commission changes its allocations plan. Entry by new central-city newspapers is even more unlikely. Thus, we are dealing in an area in which concentration cannot be reduced by market forces unless it occurs through new entry in weekly newspapers, magazines, advertising/news circulars, or other less important advertising-information media.

Given the relative immutability of media concentration, the prudent approach is to adopt a rather strong standard for cross-ownership. I do not believe that we should imitate the antitrust case law by distinguishing between new combinations and older agglomerations of market power because we cannot presume that market forces will eventually lead to increased competition through new entry. Whether this standard should be based upon concentration ratios—computed on the basis of audience or advertising shares—or less precise data, the standard should be the same for divestiture and new cross-ownership and it should be sufficiently stringent to be at least consistent with earlier Commission decisions dealing with media concentration.

An examinaiton of immediately relevant precedents in this area indicates that the Commission's administrative standards for judging competition or concentration have, at least until now, been more rigorous than the judicial standards noted above. In its earlier action in this docket the Commission prohibited common ownership of VHF television and aural stations regardless of the number of television or aural station competitiors in the market. So also in its duopoly rules the Commission prohibited common ownership of television stations with overlapping Grade B contours—again irrespective of the number of competing stations in the market area. See 22 FCC 2d 306 (1970). In both these situations it is easy to imagine individual ownerships within the ban of the rule that would not meet, for example, the 30 percent foreclosure test in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).

Obviously, application of these precedents here yields different results depending on the precedent chosen, the particular mode of measurement and so on. For example, if the *Philadelphia Bank* standard of 30 percent foreclosure of the market is translated into station-audience/newspaper-circulation shares for the co-owned facilities within the "home city" (urban area in which both facilities are located), divestiture would be required in some 67 combination ownerships.[27] A *Von's Grocery* standard would require divestiture of all combinations. Reliance on our own past precedent in this area would suggest we ignore data on concentration ratios, whether measured by audience shares or other indicia of market strength, and simply ban all common ownership regardless of market shares. The majority has here adopted this latter standard—for future combinations only.

I could accept either the 30 percent concentration standard of *Philadelphia Bank* or a stricter, flat proscription of combinations in all markets, regardless of degree of concentration; the latter has the very substantial advantage of administrative convenience. What I cannot accept is the standard adopted by the majority for purposes of divestiture—that is, taking the worst cases of market concentration and distilling therefrom only those markets where the newspaper-owned station provides the only City-Grade television service.

For purposes of banning future acquisitions—including transfers of combined ownerships—the majority is prepared to find that the combination of newspaper and television stations within a prescribed service area of the station involves an impermissible degree of concentration. But it is unwilling to apply this standard to existing combinations. Instead, it adopts a standard requiring divestiture only where the city in which the combination exists receives only a single City Grade service (or comparable service for radio-newspaper situations)—in short, cases where there is a virtual monopoly of the relevant media. This is unacceptable to me. If divestiture is warranted at all—and I think it clearly is—I do not see how it can be confined to a bare handful of small markets in which there is monopoly. The fact that non-monopoly combination markets have a relatively more competitive structure should not obscure the fact—and the majority acknowledges it to be a fact—that the structure of these markets is *inadequately* competitive.

The inadequacy of the Commission's approach to divestiture is underscored by the fact that, in confining divestiture to a handful of small, monopoly situations, it is confining effective relief to markets where competition may prove, ultimately, to be unfeasible. Stations (or newspapers) in these small markets may be marginal operations with the least potential for sale at a reasonable price. Small market owners could well be the most attractive candidates for waivers in

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[27] This is based on prime-time audience shares for the television station and daily circulation shares for the newspaper. See Baer, Geller and Grundfest, *Newspaper-Television Cross Ownership: Options for Federal Action*, 14 (RAND 1974). The RAND study gives a useful analysis of various alternative criteria for measuring concentration and how it would affect the results.

order to avoid, for example, undue financial hardship.[28] Indeed, the majority appears to recognize as much—almost to the point of inviting waiver requests. Five years from now, I think we may find that no divestitures at all have taken place. I regard that as an inadequate solution to the serious concentration problem which the majority itself concedes to exist.

IV. THE CASE FOR DIVESTITURE

It is true, of course, that a prospective ban conforms to Commission precedent in connection with the duopoly and television-aural combinations. However, what we have done in the past does not dispose of the merits of divestiture in this case. In broad terms, we have three issues before us which we must carefully consider: (1) the need for divestiture, (2) the effect of divestiture (herein the question of "equity"), and (3) the legal authority of the Commission to order it.

A. Need for Divestiture

The desirability of divestiture is made out simply by observing that, in the absence of divestiture, a rule banning cross-ownership of newspaper-television stations will mean very little. As NAB's advocate pointedly expressed it in oral argument: "a prospective ban would be purely academic." While I am loath to equate the term "academic" with "meaningless," I agree with his conclusion. I think it is quite plain that the real cause for concern is existing combinations, which will not soon dissolve themselves. With regard to prospective applications for new combinations, the number of such possible applications is too small to be worth troubling about. Certainly it is not worth four years of rule-making deliberation.

Nothing in the majority opinion effectively disputes either of these propositions. In most of the markets involving newspaper-television station ownerships the stations have been commonly owned since the time of original license. Very few of the common ownerships that have been created have been dissovled by transfer of control or assignment of license. In fact, the very point has been strongly urged as one of the singular virtues of such ownerships. We are told by opponents of the ban on common ownership that newspaper licensees offer stability because, among other things, they do not traffic in licenses. I am not persuaded that non-trafficking is a virtue to be accorded any great weight; our rules forbid trafficking in any case. Furthermore, it may be that the stability of newspaper ownership is simply

[28] I do not mean to imply that I would likely be moved by waiver requests. I am skeptical that many, if any, plausible cases for "hardship" waivers exist. But I do concede that the Commission should give a fair-minded hearing on a prima facie showing by an applicant that divestiture would be an unreasonable hardship or otherwise would not serve the public interest in a special case. Indeed the law requires that we allow for the possibility of waiver. *WAIT Radio v. FCC*, 418 F. 2d 1153 (D.C. Cir. 1969).

One especially sympathetic situation for a waiver might arise if a broadcaster decided to found a daily newspaper. One need not anticipate this circumstance frequently arising, but it is not impossible; see, *e.g.*, "Wichita Broadcaster, Countering Trend, Starts a Weekly Paper," New York Times, Oct. 29, 1974.

a result of the fact that newspaper-owned stations are, on the whole, well-located and profitable. Besides, the very stability of ownership proves the point that we cannot realistically rely on future transfers to dissipate the concentration of ownership.[29] As for the second point, concerning possible future application by newspaper interests for stations which would fall within the scope of our rule, it suffices to observe that in the past decade the number of such applications has been negligible.[30]

B. Effects of Divestiture

The majority rejects the remedy of divestiture for newspaper-television station combinations in all but a very few cases of pure local monopoly. The reason they give for treading so lightly on existing combinations while enacting strict standards for prospective combinations is a professed fear of disrupting the "stability and continuity" of the local broadcasting service. This justification seems to me a makeweight; if it were not, I doubt whether the Commission would routinely approve the numerous transfers of broadcast licenses it passes on each year. If transfer of ownership is disruptive, *per se*, it should be no more disruptive when ordered by the Commission than when undertaken voluntarily by the licensee.

But, of course, as we all know, the mere transfer of ownership of a broadcast station or of any other business enterprise need not be accompanied by any disruption of its daily affairs. Management and operating personnel frequently remain with the enterprise, assuring a smooth transition. Indeed, any other action by the new licensee would only reduce the value of his franchise. Therefore, absent any contrary evidence, we have every reason to believe that even the most ambitious divestiture policy would have very little effect upon routine broadcast operations.

It is argued by opponents that a divestiture policy might actually undermine diversity because without the advantages of joint ownership, some stations, or some newspapers, might be forced into bankruptcy. Although the argument is sometimes expressed in terms of newspapers subsidizing marginal stations, the reality generally seems to be the other way—that newspapers are being subsidized by stations. Such was reportedly the case with Channel 5 in Boston, and such is allegedly

[29] It is true that a number of combinations has been reduced somewhat in recent years, but one of these (WHDH–TV in Boston) was ordered by the Commission; another (KFBC–TV in Cheyenne) was influenced by threatened Commission divestiture (a hearing had been designated on the issue of concentration). In a third case, which is pending, it is apparent that the transfer is influenced by the desire to eliminate the need for FCC approval (and possible denial) of a merger between two large newspaper chains. Voluntary divestiture may also have been designed to soften possible Justice Department opposition to the merger. In a fourth case the elimination was the result of the failure of a UHF station in a marginal market. In other cases it is not known what factors may have influenced the elimination. However, some of these may have been influenced by the threat of forced divestiture as a result of the Commission's rulemaking proceeding and the Justice Department's vigorous opposition to renewal of newspaper owned stations in several major markets. In short, there is no reason to expect a continuation of this "trend"—if it can be called that—in voluntary separation of ownership. But even if it did continue, at a rate of, say, three per year (approximately the rate over the past four years if one discounts the above-mentioned special cases) it would not suffice. I do not think the public should have to wait 25 to 30 years to realize the benefits of competition—benefits which, we are all agreed, the public is entitled to. This is especially true when one considers that ultimate voluntary separation is not assured.

[30] As best I can ascertain—the Commission's records are not instructive on this point—there have been none since at least July 1970.

the case in other markets as well.[31] To the extent that this is the problem, I think the Commission ought to give slight weight to it, as a general matter, for several reasons.

First, we do not have any reliable information on the degree of cross subsidization and what would happen to current newspapers after divestiture. The fact is, however, that if the stations were sold at a reasonable profit, the profit could be re-invested in another enterprise which could support the paper as well as a broadcast station could. Why should cross subsidy—assuming it is a good thing (a temporary assumption to be examined momentarily)—only be achieved by operating a television station? If an owner wishes, for whatever motive, to subsidize an unprofitable newspaper, I see no reason why he could not do so just as well by taking the proceeds from the sale of the station, investing in some other lucrative enterprise, and using the resulting income to support the newspaper.[32]

Second, whatever the general public interest merits of subsidization of newspapers I do not think that this is, in itself, a proper concern of the FCC. That does not mean that we could not accept, as a reason for not requiring divestiture, a showing that the newspaper would fail were divestiture required. This "failing company" defense has been recognized in antitrust law since *International Shoe Co. v. FTC*, 280 U.S. 291, 302–303 (1930), and I am prepared to entertain it in an appropriate case. As a general proposition, however, I doubt that I would accept the failing company argument as an automatic and absolute defense in the case of broadcasting; I question the wisdom of encouraging the use of broadcast profits to support other, failing business, even newspapers.[33] However, in any event, I would accept the defense only on the limited conditions which have been imposed by the courts in antitrust decisions. The two major limitations, enunciated in *International Shoe* and adhered to by the courts since, are: (1) the

[31] For example, in Washington, D.C. broadcast holdings of Washington Star Communications are allegedly subsidizing the newspaper subsidiary, The Star-News. I use the terms "reportedly" and "allegedly" to underscore the fact that in neither case are the established facts sufficient to support definite conclusions that there is cross subsidization. In the Channel 5 case the fact that the co-owned newspaper (the Herald-Traveler) merged with another newspaper after the station (WHDH) failed to be renewed proves nothing, unless it is also shown that it would have continued if the co-owned station's license had been renewed. In the case of Washington Star, there is an allegation by the owners that the co-owned stations (AM–FM–TV) are necessary to support the newspaper (Applications to Transfer Control, BTC–7601), but we have yet to ascertain what the facts are.

[32] The counter to this may be that no other such lucrative enterprise offers the same possibility for cross subsidization. There are two possible anchors to this speculation. One is that no other investment is quite so profitable as a television station, the other is that economies of scale permit special saving. If the first statement is true, however, it is irrelevant because the supra-normal profitability of the station would be capitalized in the sale price leaving the former owner with the same present-value of capital as before. The second statement would appear to be at odds with the owners' argument that stations and newspapers are separately managed and are, as news gathering and entertainment vehicles, genuinely unrelated.

[33] Even assuming that it is appropriate public policy to subsidize newspapers, it is not at all clear that broadcast profits are better put to this purpose than to enriching the program offerings of the broadcast stations. Internal subsidization is hardly an unknown technique; it is familiar not only to the broadcast industry but throughout the regulated sector. See Posner, *Taxation by Regulation*, 2 Bell J. Econ. and Mgt. Science, 22 (1971). It would seem more efficient, however, and more in accord with *FCC* policy, to see that the subsidy is devoted to support unremunerative *broadcast* services, rather than newsprint services. As to the supposed benefit of supporting competition for the co-owned broadcast station, the question that needs to be asked is whether under these circumstances of co-ownership there is adequate competition. It is not a full answer to this question to say that this competition is better than none since subsidization of a failing newspaper may serve to retard new competitive entry—in some form—that may take the place of the old service.

resources of the acquired firm "are so depleted and the prospect of rehabilitation so remote" that the firm faces "the grave probability of a business failure"; (2) there is "no other prospective purchaser." *International Shoe Co., supra*, 280 U.S. at 302–303. See also, *e.g.*, *Citizen Publishing Co. v. United States*, 394 U.S. 131, 136–37 (1969).

In addition to the arguments that a divestiture policy might lessen diversity, the NAB has also argued that divestiture would disrupt station finances and that it would be unfair to investors who had put up money on the strength of the expectation that the property they had invested in would be left intact. Such arguments have very little weight. The proposed rule would not require the owner to forfeit its interest; the station would be sold—with the capital value of the franchise included in the sale price, or one station could perhaps be exchanged for another station. Even if the forced sale should return something less than the expected value, this should, I think, be of little concern. In most instances the facility will have returned the original investment to the owner several times.[34]

There is another argument that can be similarly dismissed—that because the large stations are so expensive, any forced divestiture would lead to large group owners coming into the local markets because they would be the only ones that would be able to afford the expense. This proposition I find most doubtful. The expensive large market stations would find little difficulty in attracting capital. Banks are happy to lend money to responsible entrepreneurs, especially those lucky enough to stumble on the opportunity to buy, for example, WTOP–TV; I do not believe we will have to wait for ITT to come along to make such a purchase. And, in any event, the FCC can condition the transfer upon approval of the future owner. It is true that, under Section 310 of the Communications Act, the Commission is forbidden to consider whether a transferee is the best among other possible candidates. But this prohibition does not deny the Commission the power to ensure that any transferee of the station meets the basic qualifications which are embedded in its general rules and any special conditions which it might create for the particular purpose of the transfer for the divestiture.[35]

C. Legal Authority for Divestiture

The argument has been made by some opponents of the rule that the FCC does not have authority to order divestiture of existing owner-

[34] For original licensees, this point seems quite obvious, especially in the concentrated markets with which we are most concerned. For licenses which have been recently acquired through transfer (and the franchise value thereby capitalized into the value of the station) there is some possibility that the current owner may not have fully recouped its investment. Even here, however, I am unwilling to assume that the public interest compels us to ratify the licensee's expectation that its three-year license constitutes a perpetuity which should not be revoked when other, and weighty, public interest considerations may require it.

[35] I am not at all clear that it would be such a bad thing for new multiple owners to be attracted into television broadcasting—conceding, *arguendo*, that a divestiture policy would have this result. Whatever our policies may be respecting co-ownership, group ownership constitutes a bulwark—and to my mind a highly desirable one—against the economic power of the networks.

The contention that divestiture would cut against our policy of local ownership and bring in a new crop of non-local owners is far from impressive. The local ownership policy has never represented an especially strong preference of the Commission's. But even if it bulked large on our agenda of values, it would be difficult to swallow coming from its present proponents, considering the number of major market broadcast outlets that are owned by non-local newspaper chains.

ships, in absence of specific statutory authority—even if such ownerships were found to be in present violation of an FCC rule. This argument rests on the mistaken premise that every particular aspect of our authority must be traced to some clear statutory term. If any such an assumption could have survived *NBC v. United States*, it clearly gave up the ghost with *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

I do not wish to overstate the FCC's authority; in fact, it is not necessary even to concede the expansive powers suggested in *NBC* and affirmed in *Southwestern Cable* to sustain the action here. That we have the basic authority to promulgate rules of this general character cannot be reasonably disputed. On the question of our general rulemaking power, *Storer Broadcasting Co. v. United States*, 351 U.S. 192 (1956) is dispositive. On the question of agency power to enact rules and enforce them retroactively against existing license interests, *American Airlines, Inc.* v. *CAB*, 359 F. 2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966), affirmed just such a power. See also *WBEN, Inc. v. United States*, 396 F. 2d 601 (2nd Cir.), *cert. den.*, 393 U.S. 914 (1968). Authority in the present case follows *a fortiori* from these precedents in light of the fact that the interest in a broadcast license is limited and conditional. It is subject to application for renewal at the end of a three year term and the renewal application is subject to such rules and conditions as are in effect, not during the license period, but at the time of the renewal. *Transcontinent Television Corp.*, 308 F. 2d 339 (D.C. Cir. 1962).[36]

Opponents of the rule have attempted to make divestiture something special, a distinctive remedy requiring specifically granted authority. But, on the contrary, divestiture here is nothing more than the consequence of an immediate application of a general regulation declaring a public interest term on which licenses shall be permitted to operate. The effect here is identical to the effect given the rule in *American Airlines*. It is also identical to the effect of the rule in *Transcontinent* given the fact that the divestiture here is to take effect only after a future period that exceeds any present license period. By way of conclusion, one general observation: it is very important that it be recognized that this proceeding, and the concerns underlying it, results in significant part from our own previous decisions in allocating the broadcast spectrum. The Commission's objective of stimulating localism required that television frequencies be dispersed as they are—and the result has been that most television markets are highly concentrated.[37] In a very real sense, the fact that Cleveland has only three VHF stations makes similar concentration in Kansas City inevitable. The only way additional television stations could

[36] Concededly, an interest in reasonable flexibility and fairness in adjusting general rules to individual cases dictates that we leave open the possibility for waiver. That is assumed with all our rules. See *Storer Broadcasting, supra; WAIT Radio v. FCC*, 418 F. 2d 1153 (D.C. Cir. 1969). Nothing we do here precludes us from considering pleas for individual, special treatment, where it can be shown to be necessary. But the possibility of special dispensation to serve the needs of equity does not undermine our power to make general findings of public interest and apply them generally without individualized proceedings.

[37] For a general critique of localism and an attempt to assess its costs in terms of foregone diversity and additional services, see R. Noll, M. Peck and J. McGowan, *Economic Aspects of Television*, ch. 4 (1973).

possibly get enough advertising revenues to survive would be for new networks to form, a development which is made impossible by the absence of a fourth or fifth equivalent frequency assignment in most markets. Thus, Commission policies themselves must bear a large portion of the blame for local market media concentration. I do not say that important benefits do not result from this policy of localism. But there are certainly substantial costs in terms of foregone potential for greater diversity. The fact that we adhere to a local allocations policy does not undercut the case for completion and diversity; it rather underscores the high importance of adopting all feasible measures to offset the limitations which a localism policy imposes on competition and diversity. The present proceeding seeks to do this in a modest way. I regret that the Commission has not gone further, by requiring general divestiture.

Appendix C

FCC 75-627

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTIONS 73.34, 73.240, AND 73.636 OF THE COMMISSION'S RULES RELATING TO MULTIPLE OWNERSHIP OF STANDARD, FM AND TELEVISION BROADCAST STATIONS	Docket No. 18110

MEMORANDUM OPINION AND ORDER

(Adopted May 28, 1975; Released June 5, 1975)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT; COMMISSIONERS HOOKS AND WASHBURN ABSENT; COMMISSIONER ROBINSON CONCURRING IN PART AND DISSENTING IN PART.

1. The Commission has before it a series of pleadings [1] dealing with our recent decision [2] adopting rules governing cross-ownership of daily newspapers and television or radio stations in the same local area. Some of these pleadings are filed by parties subject to a divestiture requirement under the newly adopted rules, and in such cases seek either a clarification or an alteration of the standard we indicated would apply to the need for such divestiture. Some background information to place the subject in perspective is required.

2. In the *Second Report and Order* the Commission held that the public policy considerations favoring greater diversity of ownership (and on which the Commission relied in adopting a prospective rule) were not the only points to consider in examining existing daily newspaper-television station cross-ownership from the point of view of the possible need for divestiture. In addition to the theoretical advantage of greater diversity, the Commission determined that it was necessary to take into account the impact of any possible divestiture requirement on the public and affected parties alike. For existing stations,[3] the balance was drawn so as to require divestiture by January 1, 1980, only in instances where the degree of media concentration (*i.e.*, lack of diversity) could be labeled as egregious. Seven television stations and nine radio stations were affected by the divestiture requirement. Under Sections 73.35(c), 73.240(c) and 73.636(c) of the new rules, television

[1] Petitions for Reconsideration of the *Second Report and Order* in this proceeding filed by (1) James B. Skewes and Southern Television Corporation, licensee of Station WTOK-TV, Meridian, Mississippi; (2) The Brockway Company "Brockway", licensee of Station WWNY-TV, Carthage, New York; (3) The American Newspaper Publishers Association ("ANPA"); (4) Gray Communications System, Inc., licensee of Station WALB-TV, Albany, Georgia; and (5) Radio Stamford, Inc., applicant for the facilities of Stations WSTC AM and FM, Stamford, Connecticut. The licensee of the stations, Western Connecticut Broadcasting Company, filed an Opposition to this petition. In addition, a pleading titled Petition for Reconsideration was filed by the Findlay Publishing Company, licensee of Stations WFIN(AM) and WHMQ(FM), Findlay, Ohio, but the relief requested is different from the other petitions as is explained below.

[2] *Second Report and Order*, 40 Fed. Reg. 6449 (1975).

[3] Separate provisions of the new rules bar the creation of new combinations or the voluntary sale of existing combinations to a single party, on terms that are stricter than those provisions dealing with divestiture. (See footnote 6.)

station-daily newspaper combinations or radio station-daily newspaper combinations are to be considered as egregious if one party owns, operates or controls the only daily newspaper published in a community as well as the only television station that places a city-grade signal over that community or the only radio station(s) that place such a signal over the entire community. In effect, these are considered to be monopoly situations in each medium, with a newspaper monopoly being said to exist if no other daily newspaper is published in the community, a television monopoly being said to exist if no other city-grade television signal encompasses the community and a radio monopoly being said to exist if no other city-grade radio signal encompasses the community.[4] Encompassment by a city-grade signal from a competing station, obviates the need for divestiture, but for this purpose only commercial stations are counted. Educational stations (television or radio) do not suffice nor do satellite television stations nor foreign stations nor translators, FM or television. Television semi-satellites, distinguished from satellites on the basis of the former's origination of local news and public affairs, do suffice. For the purposes of the rules, interests in being on January 1, 1975, were the ones to which the divestiture provision applied.

3. With all this in mind, we turn first to the case presented jointly by Skewes and Southern Television Corporation. Their concern is that using a January 1, 1975, date for determining what interests need to be divested could force them to divest even though the facts upon which such an outcome would be premised might change. They acknowledge that the rule applies to their Meridian, Mississippi, newspaper/television cross-interests, but they point out that there is a satellite television station there which provides a city-grade signal to the entire community. While this satellite does not now (nor did it at January 1, 1975) qualify as a second service, their expectation is that the satellite station would soon become a semi-satellite and eventually a regular station.[5] They are fearful that such a change in the media situation might not be considered by the Commission. To protect them against this possibility they requested a clarification to indicate our willingness to take such a subsequent event into account.

4. This request is fair enough, for it was not the Commission's intention to ignore subsequent events that would remove the necessity for divestiture. Rather, it was an intention to limit the divestiture rule's applicability that led to use of the January 1, 1975, date. We did not intend to extend the list of divestiture cases even if the facts changed to bring other combinations within the ambit of the divestiture standard. This could happen, for example, if a competitive station changed its facilities or transmitter site with the result that it would withdraw its city-grade contour from encompassment of the newspaper community. While it could be argued that in a technical sense this would provide a basis for adding to the divestiture list, approaching the matter this way would add a perpetual uncertainty so that licensees could never be sure the issue was ever settled. This is clearly unacceptable. On the other hand, if the facts changed sufficiently so that the

[4] However, if that community has its own separately owned television station, no divestiture need take place as to the radio station-newspaper combination.

[5] Such is the Commission's expectation too, as indicated in our recent conditional grant of the renewal applications of this satellite and its Tupelo, Mississippi, parent station.

situation ceased to be egregious, no purpose would be served by ignoring this change. Accordingly, we wish to make clear our complete readiness to consider such changes, but we warn any possibly affected parties that if events which they expect to happen do not come to pass, the divestiture requirement will nonetheless apply. In other words, we shall consider changes but shall not protect stations against an excess of confidence in expecting them to take place in time to avoid the need for divestiture.

5. The next petition is that of the ANPA, in which it argues that the Commission was without authority to adopt the rules it has adopted and that our action doing so was contrary to the public interest. As to the former point, ANPA cities cases in support of the argument that it is improper to single out a particular class as ineligible to be licensees. Moreover, it charges that we are interfering with First Amendment rights, particularly by abridging the right to publish a newspaper. It also argues that the Commission erred on the factual premise underlying the new rules when it failed to recognize that newspapers and stations speak with separate voices even if they are under common ownership. In sum, we are charged with having improperly singled out newspaper publishers as second class citizens, a step which would harm not aid the public. It also argues that if the Commission did not agree with this overall view, it should at least establish a more flexible approach to application of the prospective rules and to showings that parties might provide to obviate the need for divestiture.

6. As to the prospective rules,[6] ANPA is concerned because, as existing combinations are sold to separate owners, the public could lose the benefit of the superior service that newspaper-licensed stations now provide. It also is concerned about problems that might arise in connection with being able to obtain outside equity capital. The requirements regarding operation of the corporation that lenders might specify to protect their investment could be viewed as causing a change in *de jure* even if not *de facto* control. Since the new rules would bar such a transfer of control over newspaper/station combinations, ANPA is of the view that the rules could impede the flow of needed capital, thus damaging the operations. The only alternative we provided, obtaining a waiver, is a route ANPA says would be too slow and cumbersome to follow. ANPA argues that the prospective rules are a poor bargain, offering no real gain in diversity or otherwise. In any event, according to ANPA, the rules are not needed as the number of combinations has been dropping steadily even in the absence of rules. ANPA would have us amend the prospective rules to allow applicants proposing a new combination or transfer of an existing one to show either that such a combination would be consistent with a desire to maximize diversity or that there are other countervailing factors sufficient to justify creation or continuance of the combination. It sees such an approach as being no different from the balancing of the benefits and detriments that the Commission did in the area of divestiture.

7. ANPA asserts that in the area of divestiture, the Commission's definition of monopoly, based on city-grade encompassment, is overly

[6] Specifically, these rules bar newspaper acquisition (initially or by voluntary change in ownership) of a station if the television Grade A, AM 2 mV/m or FM 1 mV/m contour encompasses or would encompass the city in which the newspaper is published. If existing combinations are voluntarily sold, it must be to separate buyers. See §§ 73.35(a), 73.240(a), and 73.636(a) for AM, FM and TV, respectively.

technical and in fact arbitrary. ANPA objects to the Commission's decision not to include other media in arriving at the divestiture group which were described as television and radio monopoly cases. The Commission is said to have gone beyond the Supreme Court's dictum in *RCA* [7] regarding sanctions that might be called for in true monopoly situations. According to ANPA these are not monopoly situations as the affected parties could show. Merely to allow for the filing of waiver petitions is considered by ANPA to be inadequate, particularly if we do not allow more time than provided by the original August 12, 1975, deadline.[8] In addition, it wants the Commission to assure parties that arguments based on economic hardship or loss of service will be accepted as bases for waiver and that the Commission would view the entrance of a new newspaper or broadcast or cable service as sufficient to obviate the need for divestiture. Finally, it asks us to modify the statement in the *Second Report and Order* that we would not be inclined to grant waiver if it were premised on views we earlier rejected.

8. None of ANPA's major arguments are really new;[9] all were considered and rejected before and nothing it has said about these points since offers any basis to change our views. On the prospective aspect it offers nothing that refutes our earlier conclusion that more diversity would result by requiring that only non-newspaper parties may acquire broadcast interests in the area in which the newspaper is published. ANPA simply considers the gains to be smaller (or conjectural) and it would draw the balance differently, but this does not cast doubt on the subject of drawing the balance as is discussed at length in the *Second Report and Order*. That discussion need not be repeated except to say that we believe the gain in terms of diversity to be real as well as important. As to sales of existing interests, ANPA seems to be in the position of arguing that there is no need to be concerned about newspaper/broadcast combinations since through natural forces sales are taking place that reduce their numbers. Yet, it also seems to be contending that we should not require a separation at sale lest we lose a superior operator. These two positions are not consistent. Moreover, our finding of a small superiority in performance by newspaper licensees was in no way shown to be a result of the fact of owning a newspaper but rather could just as well be explained in terms of journalistic traditions and pioneering broadcast operations. In any event, we cannot assume a diminution of service would result. Moreover, looking only at the small superiority obscures the important gain in diversity which would result. We continue to believe that absent unusual circumstances, diversity is the more important point when it can be achieved without hardship or disruption. We believe that the prospective rules will do this. Newspapers as a class are not barred or subjected to discrimination. They are treated exactly in the same way a television licensee already was if it wished to obtain a radio station in its area: both are barred from doing so. As we set forth in the *Second Report and Order*, we are con-

[7] *U.S. v. RCA*, 358 U.S. 334 (1959).

[8] ANPA also requests a clarification on the January 1, 1975, date; this point has been discussed above in connection with the Skewes petition.

[9] For example, we again must reject its argument that commonly owned media provide diversity. It is unrealistic to expect the same level of diversity as would be offered if the entities were under separate ownership.

vinced that authority for the actions taken is present and that it is not violative of First Amendment protections.

9. While ANPA thinks our divestiture rules are overly technical and that they ignore the fact that the public benefits from the receipt of various other media, we do not find its arguments on this point a persuasive basis for altering these rules. What it sees as overly technical, we see as both predictable and precise. As written, the rules permit all parties to know the application of the standards so that there can be no ambiguity. This standard also is reflective of the actual media situation, although certainly not exactly. City-grade is a meaningful signal level and indicator of proximity. In addition, not all media, regardless of location, circulation or other aspects warrant being taken into account, particularly if their impact were clearly minor. ANPA offers nothing new on this point, nor does it show why mere numbers should govern regardless of the importance of the outlets. As to media, significant in themselves but geographically removed, the fact remains that outside media are just that, outside in terms of dealing with local problems, and thus a viewable television (or listenable radio) signal or the presence of a weekly news magazine cannot be the governing factor. The city-grade contour also is a concept that we have often employed in a context which although different from multiple ownership nonetheless reflected parallel thinking on the obligation of stations to serve nearby communities on a secondary basis. We continue to believe this standard enunciated in the *Ascertainment Primer* remains the appropriate standard.

10. It is not quite clear how ANPA's approach to waiver grounds differs from that of the *Second Report and Order* save for their clear desire that they be generously granted. We touched on economic hardship and possible loss of service as grounds on which to seek waiver in our earlier document and do not see a reason to make any alteration in those views which called for full consideration of either. On the matter of subsequent events that affect the need for divestiture, we agree that a new daily newspaper or station subsequently established would suffice, but we cannot take a similar view about a newly created cable system. That point like any other will be considered and given appropriate weight in evaluating a waiver request. Many cable systems do not originate nor, of course, do they carry signals of stations dealing with local issues. The signals they import are those of outside stations. The presence of cable cannot be determinative for even with origination we cannot conclude that these originations would be the equal of what a station would do. We are ready, however, to consider the specifics of any particular situation which we might be asked to consider. The necessity to judge waiver requests on their merits and without prejudgment is not underminded if we warn parties in advance that arguments which we have rejected before will not provide support for waiver.

Parties remain free to offer all pertinent argument in support of waiver and we will consider their points carefully, but what they may not do is relitigate the basic premises, as if they were presenting us with another petition for reconsideration. To give an example: though a party subject to divestiture may wish that we had used encompass-

ment by a Grade A or Grade B contour instead of city-grade to show the presence of adequate diversity, that is a point to be made in a petition for reconsideration, not waiver. Once we have decided that issue, such a point of general applicability is resolved and not open to review in a waiver petition. A waiver petition, however, would be a place for attempting to show for example that special circumstances meant that in a particular case an incoming Grade A signal should be considered sufficient. Finally, we agree that no useful purpose would be served by insisting on an August 12 filing date for petitions for waiver now that it has become clear that judicial review will not be concluded by then. Sixty days after judicial review is completed seems an appropriate date to substitute, one which should allow sufficient time to prepare the filing and would give ample time for our action before any divestiture need take place.[10]

11. The petition filed by Gray Communications notes its total disagreement with the Commission's decision but focuses its primary opposition on the Commission's statement that it was not inclined to hold evidentiary hearings on waiver requests. In Gray's view, the Commission cannot properly evaluate the information regarding particular markets on which the grant of waiver would turn unless the affected licensee were afforded a hearing to offer these facts. Emphasizing court holdings which recognize a legitimate interest by broadcasters in having a security of tenure and in being able to obtain a preference for superior service, Gray asserts that both goals are being undermined by what it sees as a retroactive application of what is alleged to be a prospective rule. Even though it recognizes that court cases have held that rules (even if a license is modified in the process) can be put into effect without holding a prior evidentiary hearing, it argues that here the facts about the local situation are peculiarly within the knowledge of the licensee and hence a waiver hearing is necessary so they might be adduced. It also objects to our stated refusal when dealing with waiver requests to relitigate issues previously resolved.

12. As to the final point, it must be rejected on the same basis as was the essentially similar argument of the ANPA. Likewise, the contention that waiver hearings are a necessity before divestiture could take place seems to rest on several misunderstandings. First, it has been long established that the Commission is able to modify a class of licenses during their terms by way of rule making actions.[11] Moreover, where individual modifications were involved, the Commission simply postponed the effective date until the current license term had expired, and on this basis there is no license modification during its term as the rule's application is deferred until much later, namely, January 1, 1980. Thus the § 316 requirement for an evidentiary hearing does not apply. As to the consideration of the facts regarding the particular local situation, the Commission does not need to hold a hearing under ordinary circumstances. This is particularly the case where it is not the facts that are in dispute but their legal significance. If

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[10] KCMC, Inc., licensee of Station KTAL–TV, Texarkana, Texas, and co-owned with the only daily newspaper there has sought a declaratory ruling that it was incorrectly listed for divestiture. Pending action on that petition it has moved for an extension of time for filing a petition for waiver of § 73.636(c) to 120 days after the date on which the Commission releases an order disposing of the petition. Whether such an extension may later prove necessary cannot be determined now, so we shall grant the motion to the extent already specified for all other parties.

[11] See *e.g. WBEN* v. *FCC*, 396 F. 2d 601 (2d Cir. 1968) *Cert. den.* 393 U.S. 914 (1968).

there are disputed facts and a hearing is necessary to resolve them, the Commission can hold such a hearing but such is not the norm, nor is it expected to be here. If the issues posed by the waiver petitions do not bear out the Commission's expectations, it can easily alter its procedures should fairness or other reasons so dictate.

13. We now turn to the only petition which would broaden the category of divestiture cases. Radio Stamford argues in its petition that the Commission should not have exempted the Stamford, Connecticut, Stations WSTC(AM) and WYRS(FM) which are the only ones licensed to the community and are owned in common with the only local daily newspaper. According to Radio Stamford, the only other city-grade signals that encompass Stamford are two clear channel AM stations in New York City, which it insists do not offer a locally oriented service to Stamford so as to provide a reasonable basis for concluding that there is real diversity there. To remedy this it would change the rule to not take into account an incoming city-grade signal if it originates in a separate SMSA. This, it argues, better coincides with the reasonable expectation regarding what needs a station will endeavor to service. The licensee has opposed this with a lengthy engineering showing of the primary coverage available to Stamford and vicinity. It also charges Radio Stamford with a failure to participate earlier, something it sees as a fatal defect if the arguments are offered for the first time in a petition for reconsideration. It also questions Radio Stamford's standing, alleging that as a mere applicant it is not a party aggrieved. On the merits, we are asked to affirm our action which adopted standards that exempted Stamford.

14. We do not intend to rely on any alleged procedural deficiency in acting on this petition because we think it a matter we should reach on the merits. The petition requires denial because it rests on a fallacy and a misunderstanding. The fallacy is that our decision was based on a conclusion that the outside stations which encompass the newspaper community are operating in a manner to serve its needs. The misunderstanding is that if they do not already do so we did not intend a change in this situation. Neither is accurate. We recognized that some of the outside stations which encompass the newspaper communities were already serving the needs of these communities, but we also knew that a number of others were not doing so. Therefore, we stated in footnote 36 of the *Second Report and Order* that such stations would need to undertake this effort and direct themselves to these needs on a secondary basis. In this particular case the obligation is one to be shared by the two stations and discharged in a manner they think best conducive to our goal. We have been shown no reason to think this approach is any more unworkable or inappropriate here than elsewhere. On the other hand, having a rule which would be dependent on the vagaries of changing SMSA definitions and station location would not promote fairness but it would introduce difficulties in administration. Finally, we have a problem with any suggested alternative which is geared to deal with a particular situation, as appears to be the case here, rather than the general situation. This is neither necessary nor wise, and we shall reject it.

15. We now come to the very extensive filing by The Brockway Company, publisher of the only daily newspaper at Watertown, New York, and the licensee of the only full-fledged American commercial

television station that provides Watertown with a city-grade signal. Brockway contends that the Commission erred in refusing to consider encompassment by educational television stations and for this and other reasons considers the standards employed by the Commission to be unrealistic. It also objects to the Commission's action on its own motion exempting a television station at Hickory, North Carolina, and a radio station at Brookfield, Missouri, from the impact of the rules. Brockway asserts that if the Commission thinks it proper to evaluate qualitative matters as it did in those two cases and thereby extend its inquiry beyond a simple examination of city-grade contours, then it needs to do so for Brockway's situation as well and recognize the inappropriateness of divestiture. According to Brockway, there is significant attention to the affairs of Watertown that is provided by media not counted under the Commission's test and it urges the Commission to examine the situation so that these points can be taken into account.

16. Although Brockway has offered a large amount of information regarding its own situation, much of this is material better directed to obtaining waiver. To take one example: if Brockway's argument were that educational stations as a group provided sufficient news and public affairs to be counted as a commercial station would be, that is a matter which is appropriate for resolution here. On the other hand, if the argument is based on the programming of the particular station that encompasses Watertown with a city-grade signal, it is a quite different matter, one far more suitable to consideration in connection with a waiver request. The reason is simple to understand; without a showing that this is the typical case, it is impossible to rely on this information to show the general situation, and it is just this norm which is the suitable basis for rule making and what differentiates it from *ad hoc* adjudications. While much of the information and argument may not be suitably considered now, Brockway is entitled to have it considered on the merits. To simplify matters it may incorporate the present pleadings by reference in any supplementary material it files seeking waiver. The general issues, of course, will be resolved here.

17. We do not agree with Brockway that on an across-the-board basis educational and commercial stations can or should be considered as equivalent for the purposes of these rules. That the Commission is considering imposing formal ascertainment requirements on educational stations is not the point. Nor is there any dispute about the observation in the ascertainment *Notice* that educational stations have always had the duty to determine local needs and respond to them. Although, the general obligation of serving the public interest accompanies any broadcast license, for this fact to be meaningful here, it would be necessary for the response to this obligation to take such a form as would demonstrate adequate diversity. No requirement governing the nature of the programming effort of an educational station exists, and formalizing the ascertainment process would not change this fact. Specifically, in view of the extremely high costs involved, there is very little news gathering on the local scene by educational stations. Even if they present news and public affairs of a non-local nature this is not demonstrative of diversity on local issues. This lack of local orientation was the reason for our action refusing to take into account commercial signals of less than city-grade. Brockway states that there is no mini-

mum specified in the time a commercial station devotes to news or public affairs, but this fact does not obscure a recognition of the situation as it exists. Moreover, if the implication of Brockway's argument were true, it would cast doubt on automatically exempting combinations if an outside commercial station encompassed the newspaper community. This would be the result of our not being able to rely on the fact that these stations offer news and public affairs, and under this test, encompassment would be irrelevant unless we found a significant programming response in local news and public affairs. This method of proceeding was implicitly rejected in the *Second Report and Order* because we did not want to enter a thicket of qualitative judgments, based on the performance of stations on an individual basis. Nonetheless, when it comes to waiver rather than the establishment of general rules, the particular efforts of the educational station in Brockway's area could be considered for whatever weight they deserve. Since we cannot simply equate educational and commercial stations, changing the rules on such a premise must be rejected.

18. Brockway charges it is arbitrary to include its interests on the list for divestiture even though there are three other city-grade signals available (one translator, one educational and one Canadian) and it has a program-originating cable system and receives two Grade B television signals from Syracuse stations. This it contrasts with the Columbus, Mississippi, situation where no divestiture was required because a Tupelo, Mississippi, station provides a city-grade signal, the only other one the residents of that city receive. It asserts that its own situation is much different with much more diversity being offered by media not present in the other case. It also asserts that the Tupelo station does not address the needs of Columbus. The trouble with this argument is that Brockway in effect is asking us to hold on a general basis that several apples (translators, Grade A or B signals, etc.) count as much or more than one orange (a city-grade signal). The rule specifies the latter and not the former because one city-grade signal if it encompassed was thought to suffice and the other media were not thought to have enough impact or directed themselves to local issues and we continue to believe this.

19. Just as with educational stations, we were not prepared to accept translators or foreign stations as sufficient to demonstrate diversity. A translator is nothing more than a low power station which functions as a mechanism for extending the range of a distant station, which by virtue of its separation does not respond to the needs of the newspaper community. Realistically it could not be required to do so. This is not to say that the choice of entertainment and other programs which translator stations help make possible is not important; it is. In fact, on national or state issues they can offer material which is important in providing diversity, but this does not extend to the area of local news and issues, and this is the vital concern with which we were dealing. A foreign station ordinarily would not do so either, and as we observed before, even if it did, there is no certainty that it would continue doing so or a way this Commission could act to insure that it would. Finally, there is the presence of a cable system, but here, too, even with origination, the system could not be considered the equal of a station providing a city-grade signal. Any argument that a particular system offers such diversity on a par with a city-grade signal, belongs in a waiver context,

not here. Nor do all systems have the percentage of subscribers that the Watertown system does, nor does it typify the industry in terms of local origination. Thus, while the special facts may be considered in connection with a waiver request, we cannot use them to formulate a revision of a rule of general applicability.

20. Finally, Brockway would have us re-write the rules to include consideration of smaller local media and media from outside the city of Watertown, since in its view theirs is not a "local" market as such but one containing several counties in its primary area. Under their system, Grade A and Grade B signals would also be included and so would the cumulative impact of weekly newspapers. This, however, is not dispositive on the matter of our primary concern, that of local diversity. Outside media ordinarily cannot be expected to give much attention to local affairs and the smaller local media would ordinarily not be expected to have a large impact. Brockway is free to pursue its argument that its case is unusual in this regard and seek waiver on this basis. Also, while the advertising market may resemble the picture Brockway offers, this does not connect with the principal concern, that of diversity.[12] To the extent that these or any other matters demonstrate that the situation in a particular area so differs from the norm as to arguably support waiver on that basis, parties are free to so allege. When, as in Hickory and Brookfield, the facts are clear at first blush, we need not wait for a petition. Reconsideration, however, must be denied.[13]

21. The previous discussion has dealt with all the petitions for reconsideration properly before us.[14] There is another pleading entitled petition for reconsideration, but this filing, by the Findlay Publishing Company, does not seek reconsideration of the rules we adopted as such. Rather, it seeks to have the divestiture requirement which was applied to it lifted on the basis of encompassment of the community by another city-grade signal. Because of this fact the petition will be acted upon separately when the review and analysis of the engineering data it submitted is completed.

22. Although it was not mentioned by any of the parties, there is one additional aspect to consider. In Sections 73.35(c), 73.240(c), and 73.636(c), we used the phrase "place(s) a city-grade signal over the community" to express the concept that the city-grade signal was the indicator of diversity in connection with possible divestiture. However, when it came to the prospective part of the new rules, the word "encompassing" was used instead. Since the same concept—inclusion of the entire community inside the city-grade contour—is involved, it is appropriate to make the editorial change of conforming the language to use encompassing throughout. Sections 73.35(c), 73.240(c), and 73.636(c) will be changed accordingly. Section 73.35(c) and 73.240(c) will also be changed to reflect an editorial correction.

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[12] When it comes to soliciting advertising, it does not seem that the outside media would be able to compete effectively or that the weekly newspapers would have much of an impact.

[13] A motion was filed by the National Citizens Committee for Broadcasting seeking expedited consideration of the petitions on which we are now acting. While we are not acting quite as speedily as it would have liked, the action is nonetheless quite prompt and in effect grants the relief requested.

[14] On May 2, 1975, the Nebraska Broadcasters Association, Inc. filed "Comments" but this filing is untimely even if intended as a petition for reconsideration and it need not be considered.

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23. Accordingly, IT IS ORDERED, That the relief requested in the subject petitions IS GRANTED to the extent indicated and in all other respects IS DENIED.

24. IT IS FURTHER ORDERED that the Comments filed by the Nebraska Broadcasters Association, Inc. ARE DISMISSED.

25. IT IS FURTHER ORDERED that pursuant to authority contained in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended, Sections 73.35(c), 73.240(c) and 73.636(c) ARE AMENDED as set forth in the attached Appendix effective July 11, 1975.

26. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

1. Section 73.35(c) is amended to read as follows:

§73.35 MULTIPLE OWNERSHIP.

* * * * * * *

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for AM, predicted for FM). The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

* * * * * * *

2. Section 73.240(c) is amended to read as follows:

§73.240 MULTIPLE OWNERSHIP.

* * * * * * *

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for AM, predicted for FM). The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required if there is a separately owned, operated or controlled television broadcast station licensed to serve the community.

* * * * * * *

3. Section 73.636(c) is amended to read as follows:

* * * * * * *

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial television station encompassing the entire community with a city-grade signal. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980.

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Appendix D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1064 Term, 1976

National Citizens Committee for Broadcasting, Petitioner

v.

Federal Communications Commission and United States of America

75-1152

Owosso Broadcasting Company, Inc., Petitioner

v.

United States of America and Federal Communications Commission

75-1280

National Association of Broadcasters, Petitioner

v.

Federal Communications Commission and United States of America

75-1379

WEAO, Inc., Petitioner

v.

United States of America and Federal Communications Commission

75-1386

The Ogden Newspapers, Inc., Petitioner

v.

United States of America and Federal Communications Commission

75-1387

Daily Telegraph Printing Company, Petitioner

v.

United States of America and Federal Communications Commission

75-1388

The Ogden Newspapers, Inc., Petitioner

v.

United States of America and Federal Communications Commission

75-1567

American Newspaper Publishers Association, Petitioner

v.

Federal Communications Commission and United States of America

75-1614

The Brockway Company, Petitioner

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1618 -2- Term, 19 76

Gray Communications Systems, Inc., Petitioner

v.

Federal Communications Commission and United States of America

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: BAZELON, Chief Judge, WRIGHT and ROBINSON, Circuit Judges

JUDGMENT

These causes came on to be heard on petitions for review of an order of the Federal Communications Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the rule - making order under review herein is affirmed only insofar as it operates prospectively; those portions of said order that have a retroactive effect and those portions dealing with existing combinations are vacated; and the record is remanded to the Commission for adoption of rules not inconsistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court
George A. Fisher
George A. Fisher
Clerk

Date: March 1, 1977
Opinion for the Court filed by Chief Judge Bazelon.

Appendix E

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1064

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

ELYRIA-LORAIN BROADCASTING CO., *et al.*, INTERVENORS

No. 75-1152

OWOSSO BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1289

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1379

WJAG, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

WHAS, INC., *et al.*, INTERVENORS

No. 75-1386

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1387

DAILY TELEGRAPH PRINTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

WHAS, INC., *et al.*, INTERVENORS

No. 75-1388

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1567

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1614

THE BROCKWAY COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

No. 75-1618

GRAY COMMUNICATIONS SYSTEMS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

On Motion for Stay of Mandate

Filed April 5, 1977

Judgment entered this date

Before BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

PER CURIAM: Before us is a motion filed by the Federal Communications Commission to stay the mandate to be issued by this court pursuant to its opinion and order on the merits of this case. The Commission suggests that immediate compliance with portions of our mandate would impose a "substantial burden" on its resources. Since the Commission is moving quickly to petition the Supreme Court for a writ of certiorari in this case, it asserts that such a burden ought not be required until the Supreme Court can act on its petition. The National Association of Broadcasters (NAB) supports the Commission's motion, arguing that immediate issuance of our mandate will require NAB's members to begin costly efforts leading to divestiture. The Department of Justice does not oppose the motion, but does not actively support it either. The National Citizens Committee for Broadcasing (NCCB) opposes the motion insofar as it would reinstate the requirement that petitioners to deny individual license renewal applications allege a Sherman Act section 2 violation as a precondition for a hearing on the question of undue economic concentration. NCCB would also have us stay that part of our order which vacates Commission orders requiring divestiture in 16 so-called "egregious" cases. It is not clear, however, that NCCB or anyone else will seek further review of this segment of our opinion.

Before ruling on these motions, it is important to review the salient points of our March 1 opinion. By its order in the cross-ownership case, the Commission divided its regulatory province into three parts. New broadcast licenses would not be issued to any applicant which also owned a newspaper co-located with the proposed broadcast station's area of license. Present co-located newspaper-broadcast combinations, with 16 exceptions, were grandfathered and, in addition, the Commission took the view that further challenges to the renewal of these stations' licenses would have to meet tougher threshold requirements. Divestiture was ordered only where the sole broadcast station in a locality was owned by the sole daily newspaper in the same locality.

The gist of our opinion is that the lines thus drawn between future and present co-located combinations and between the 16 egregious cases and all other present co-located combinations were arbitrary and capricious. We first indicated that the Commission had authority to promulgate its prospective rules even though the record was inconclusive on the question whether actual "abuses" flowed from newspaper-broadcast cross-ownership. We agreed with the Commission that long-established principles indicated that it could act to increase the diversity of broadcast media voices even when there was no evidence that a lack of diversity was producing harmful side effects. We recognized that the Commission had consistently acted on this principle and had received the approval of the courts (including the Supreme Court on a number of occasions) for this policy approach. Indeed, in its instant motion, the Commission has not asked us to stay our mandate insofar as it approves the prospective cross-ownership rules. Thus now as in its defense on the merits, the Commission apparently asserts its authority and intention to act to increase diversity even though it has created no record of actual abuses stemming from cross-ownership.

Having asserted its authority and intention to act in this way with respect to applications for new licenses, however, the Commission insisted that it was required to find actual evidence of abuses before it could order divestiture of presently co-located facilities. The Commission itself recognized that such a shift of position had to be justified by reference to factors differentiating pres-

ent from future licensees. One factor suggested was harm to the public interest in terms of a reduction in the quality of broadcast programming, but the Commission correctly found no record support for any such proposition. The Commission did assert policies competing with enhancement of diversity as support for its shift of emphasis, but on analysis we found that in the past these policies had consistently been given lesser weight than increased diversity and further that these policies if consistently applied in the future would require massive shifts in the practice of the Commission with respect to license transfers. We further found that the distinct treatment of the 16 egregious cases was invalid under the Commisison's announced divestiture rule since the record contained no evidence that justified their disparate treatment.

Thus, "[h]aving evaluated the policies and record presented to us, we [held] that the Commission erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture." Slip op. at 50. In summarizing this holding, we said, "The Commission has sought to limit divestiture to cases where the evidence clearly discloses that cross-ownership harms the public interest." *Id.* at 60. And, we continued:

> For the reasons expressed above, we believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.

This final sentence is part of the summary of our holding that the retroactive rules are invalid, and its purpose was to indicate that the presumption upon which the Commission acted rendered the divestiture rule invalid. Nothing in our opinion supports a contrary conclusion.

Thus we were faced with a situation in which the Commission had treated three indistinguishable groups very differently. Because of this, steps had to be taken to restore consistent administrative treatment. Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules, and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to take further steps to ensure that everyone would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt, but which it had already indicated would be available with respect to the egregious 16).

Against this background, it should be plain that staying our mandate in this case would, *pro tanto*, sanction inconsistent treatment of licensees. On the other hand, the Commission warrants that it wishes to file for review of our decision as quickly as possible, but that absent a stay it will incur substantial burdens, which could conceivably impede that effort. On consideration of these competing factors, we are persuaded to stay our mandate, only insofar as it applies to the Commission's grandfathering rules, until April 22, 1977, on the understanding that the Commission will have filed for certiorari by that date.

So ordered.

Appendix F

Communications Act of 1934, 48 Stat. 1064, as amended, 48 U.S.C. 151 et seq.

§ 152. Application of chapter.

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

§ 154. Federal Communications Commission.

* * * * *

(i) Duties and powers.

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings.

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

§ 301. License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

§ 303. Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest[.]

§ 309. Application for license.

(a) Considerations in granting application.

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

(d) Petition to deny application; time; contents; reply; findings.

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

U. S. GOVERNMENT PRINTING OFFICE : 1977 O - 232-632